TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 299.

STEPHEN A. RALLI, ALEXANDER ANTHONY VLASTO, AND LUCAS EUSTRATIOS RALLI, SURVIVING PARTNERS OF THE FIRM OF RALLI BROTHERS, APPELLANTS,

vs.

HOWARD D. TROOP AND —— TROOP, COMPOSING THE FIRM OF TROOP & SON; GUSTAVUS VAUGHAN ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1890.

(14,343.)

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1 To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Stephen Augustus Ralli, Alexander Anthony Vlasto and Lucas Eustratios Ralli, surviving partners of the firm of Ralli Brothers, merchants of London, England, against Howard D. Troop and James Troop, copartners composing the firm of Troop & Son, ship-owners of St. John, N. B. (James being fictitious, the true Christian name of said Troop being unknown to your libellants), and John Doe and Richard Roe, lately owners of the British bark J. W. Parker, of St. John, N. B., in a cause of contract, civil and maritime, articulately propounds and alleges as follows:

First. That on or about the 28th day of October, 1885, your libellants above named and one Stephen Peter Schillizzi, since deceased, in their said firm name of Ralli Brothers, and the respondents above named, who then and at all the times hereinafter mentioned were the owners of the British bark J. W. Parker, of St. John, N. B., said Doe and Roe being fictitious names, the real names of all the owners of said bark not being known to your libellants, did by their agents, Messrs. Lloyd, Lowe & Co., in the city of London, England, duly execute a written contract of affreightment, commonly called a charter-party, wherein and whereby the said respondents promised and agreed, among other things, that their said bark J. W. Parker should proceed to the port of Calcutta, India, and there re-
2 ceive from your libellants and load a full and complete cargo and proceed with the said cargo to the port of New York, N. Y., and there safely to deliver the same to your libellants or their order. In consideration of which your libellants promised and agreed to pay freight upon said cargo at a stipulated rate to said respondents.

Second. That thereafter and in pursuance of the terms of the said charter-party, and on or about the 18th day of February, 1886, your libellants caused to be loaded on board said bark, in the said port of Calcutta, a full cargo of merchandise, consisting among other things of 7,592 bales of jute butts in good order and condition, then owned by your libellants, measuring 1,974 tons; and they thereupon received from one John McManus, the master of said vessel, a certain written bill of lading therefor, duly executed by him, the said master, wherein and whereby the said master admitted the receipt of the said jute in good order and condition on board said bark, and promised and agreed to safely transport the same in said bark to the port of Boston, and there to deliver the same to your libellants in like good order and condition on payment of freight as agreed upon, to which bill of lading your libellants crave leave to refer on the trial of this action.

Third. That thereafter, as your libellants are informed and believe, fire broke out and said bark was thereby so badly damaged as to become unseaworthy, and her said voyage was thereupon broken up and abandoned by the respondents.

Fourth. That thereafter 552 bales of said jute butts weighing

219,695 pounds were delivered to your libellants at the said port of Boston, Mass., from on board a steamship.

Fifth. That the balance of said shipment of jute, to wit,
3 7,040 bales, the respondents have failed and neglected and refused to deliver to your libellants; but by their agent John McManus, the said master, they have sold the same by public auction at the said port of Calcutta, in the months of April or May, 1886, and delivered the same to the purchasers thereof, and the respondents Troop & Son have received and now hold the proceeds of the said sale.

Sixth. Your libellants have duly demanded of said respondents their said 7,040 bales of jute butts or the proceeds thereof, but said respondents have refused and neglected, and do still refuse and neglect to deliver the same to your libellants who are lawfully entitled thereto, whereby your libellants became and are damaged to the amount of the value of the said undelivered jute, which in lawful money of the United States is twenty-two thousand dollars.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction this honorable court, and the respondents have property within this district, to wit, the British barks Mary S. Troop and Premier McKenzie and ship Minister of Marine, and other vessels and property.

Wherefore your libellants pray that process in due form of law according to the course of this honorable court in causes of admiralty and maritime jurisdiction may issue against the above-named respondents, lately owners of the said British bark J. W. Parker, and that they may be cited to appear and answer under oath all and singular the matters aforesaid, and if they cannot be found, that an attachment may issue against their goods and chattels; and if none be found, that their credits and effects in the hands of J. W. Parker
and Messrs. J. W. Parker & Co., merchants at 66 New street,
4 and Messrs. J. W. Elwell & Co., merchants at 47 South street, in the city and southern district of New York, garnishees, be attached, and that this honorable court will be pleased to decree payment of the damages aforesaid with interest and costs, and that your libellants may have such other and further and different relief as may be just.

(Sig'd) SIDNEY CHUBB.
Proctor for Libellants.

SOUTHERN DISTRICT OF NEW YORK *ss.*:

Pandeli T. Fachiri, being duly sworn, deposes and says: That he is the attorney-in-fact of the libellants herein who reside in England, and none of whom are now within the United States or within one hundred miles of this city and district; that he has read the foregoing libel and the same is true.

(S'g'd) P. T. FACHIRI.

Sworn to before me, this 16th day of May, 1887.

(S'g'd) J. LYNCH PENDERGAST.
[L. S.] *Notary Public, Kings County.*

Certif. filed in N. Y. county.

(Endorsed:) Let process issue as prayed for in the within libel. Dated May 16th, 1887. A. Brown. Filed May 16, 1887.

5 District Court of the United States, Southern District of New York.

STEPHEN A. RALLI, ALEXANDER A. VLASTO, and LUCAS E. RALLI, Surviving Partners of the Firm of Ralli Bros., Libellants,

against

HOWARD D. TROOP, Surviving Member of the Firm of Troop & Son, of St. John, and Gustavus Vaughan, of Liverpool, England; James Albert Delap, John W. Parker, and Mark Shaw, of New York, Described in the Libel as John Doe and Richard Roe, Lately Part Owners of the British Bark J. W. Parker, of St. John, N. B., Respondents.

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The above-named respondents except to and answer the libel herein, as follows:

These respondents except to said libel and to the allegations thereof, in that the same states no cause of action of admiralty cognizance against these respondents.

6 Without waiving said exception, but insisting thereon, these respondents answer said libel as follows:

First. These respondents have no knowledge or information sufficient to form a belief as to the persons who now compose the libellants' firm, or who composed said firm in the month of October, 1885.

The respondents also admit that they were part owners of the British bark J. W. Parker, of St. John, N. B., and that they together owned in the aggregate forty-two sixty-fourths of said bark, and were such owners up to and until the time of the loss and condemnation of said vessel, as is hereinafter set forth.

These respondents admit that, by their agents, Messrs. Lloyd, Lowe & Co., of London, they executed a written charter-party or contract of affreightment with Messrs. Ralli Bros., whereby it was by them agreed that said bark should proceed to Calcutta, and there load a full and complete cargo and proceed therewith to the port of New York, and there deliver the same; and that the libellants promised and agreed to pay freight therefor.

Second. These respondents admit that thereafter, in pursuance of said charter-party, and on or about the day stated in the libel, the libellants loaded certain merchandise upon said ship, and that 7,592 bales of jute were so loaded, but these respondents deny that the same were in actual good order and condition, although they externally appeared so; and they admit that a bill of lading for transportation and delivery thereof in Boston was given therefor, to the original of which these respondents refer for its terms and conditions.

Third. These respondents admit the third and fourth articles of the libel.

7 Fourth. They admit that the damaged jute was sold at auction at Calcutta after due condemnation, according to law, and that the master of said bark, acting as the representative of all interests concerned, authorized said sale, and they admit that the proceeds thereof, less the legal charges and expenses, were received and held by these respondents at the time of filing the libel herein.

Fifth. These respondents deny the sixth article of the libel, and each averment thereof.

Sixth. These respondents deny the seventh article of the libel, except they admit that some of the respondents had property in this district which was attached under process of this court.

Seventh. These respondents further answering, say that, in accordance with the terms and provisions of the charter-party, a cargo of jute had been laden on said bark at Calcutta, and on February 18, 1886, said vessel was ready for sea.

Flames broke out in the hold of said bark about ten a. m. from causes unknown—but presumably from spontaneous combustion of the jute in the bales—and said bark and cargo were in great danger of destruction and of becoming a total loss.

Immediately upon discovery of the fire, the officer in charge of J. W. Parker sent for the crews of the neighboring vessels to assist, and under his supervision and direction a quantity of water was poured down the forward ventilator and fore hatchway, after which those openings were tightly covered with a sail, and all ventilators closed. Later the engines of the port came to assist, and their hose, charged with fire-extinguishing chemicals, were let into the hold through holes cut in the deck. Other sacrifices and measures were taken against the common danger, which resulted in saving

8 552 bales of jute uninjured, although the residue of said cargo was so much damaged that the same was condemned and sold.

The 522 bales aforesaid were forwarded by steamer to Boston, and there delivered to the libellants.

Eighth. One of the terms and conditions of said charter-party was as follows:

"All questions of average to be settled in accordance with York-Antwerp rules and the established usages and laws of the port of destination, to be stated by average adjusters appointed by charterers' agents and approved by owners."

In accordance with the aforesaid provision, the libellants executed and delivered their certain bond or undertaking, wherein and whereby they covenanted and agreed upon an adjustment of the losses and expenses, to be stated by Jacob R. Telfair, and whereby they further agreed that the York-Antwerp rules should be the rules of adjustment, to the original of which bond these respondents crave leave to refer.

These respondents further show, that by said expression, York-Antwerp rules, is understood the regulations or rules for general

average, adopted by the congress of the Association for the Reform and Codification of the Law of Nations at Antwerp, Belgium, in September, 1877. That among the rules and principles then announced, the congress or association, by a vote of 36 to 4, adopted and promulgated the following:

"Rule 3. Extinguishing fire on shipboard.—Damage done to a ship or cargo, and either of them by water or otherwise, in extinguishing a fire on board the ship, shall be general average, except that no compensation be made for damage done by water to packages which have been on fire."

9 Ninth. In accordance with the principle formulated in the aforesaid rule, and the legal usages of average adjusters both in this and other countries, all questions of average herein were duly settled and stated by Jacob R. Telfair, the duly appointed average adjuster.

The result of said statement and adjustment was the following account with the cargo interest represented by the libellants:

Cargo credited with auction sales	$20,752 83	
Cargo received allowances for sacrifice	21,407 11	
		$42,159 94
Ralli Bros.' disbursements		227 76
Disbursements by Thames & Mersey Ins. Co., underwriters on cargo		234 21
Charterers' balance of advances		216 21
" " of profits on charter		74 37
		$42,962 42
Less general average charges of saving		35,541 94
Balance due cargo interest		87,420 48

Said adjustment was stated on December 7, 1886.

Tenth. Immediately upon the statement and settlements of said average the same was communicated to the libellants, and to their underwriters as a final settlement under the charter-party and average bond.

The same was accepted by these respondents, and was also accepted by the underwriters upon freight. However, the underwriters on cargo served upon said adjuster the following notice of refusal to abide by said settlement:

10 "NEW YORK, *December* 13, 1886.

"Jacob R. Telfair, Esq., No. 56 Wall street, city.

"DEAR SIR: On behalf of the underwriters interested in the cargo of the bark 'J. W. Parker,' burnt at Calcutta, February 18, 1886, I am instructed to inform you that they have adopted the resolutions as offered by the adjustment committee of the national board of marine underwriters, as below:

"Resolved, That this committee is of opinion—

"First, That this is not a case for general average contribution, as the water was pumped into the ship by direction of the city authorities, and not by the order of the master or any officer in charge of the vessel.

"Second, That the case should be adjusted in accordance with the rule and custom of Calcutta, where a final separation of interest took place.

"I am,

"Yours very respectfully,

"(8'g'd) J. RAYMOND SMITH, *Secretary.*"

Eleventh. These respondents further say that the master of said bark had caused a general average statement to be made up at Calcutta immediately after the sale of vessel and cargo, but that the same had not been acted upon for the reasons that, as these respondents were informed and believe, no average bond had then been given, and that the said adjustment, although leading to almost the same result as the average statement afterwards prepared in New York, was incorrect in various details of its calculations, according to the received principles of general average in this country.

11 Twelfth. These respondents further say that they have always been willing to abide by said average statement made up by Jacob R. Telfair, in pursuance of the charter-party and the average bond, and have duly deposited the amount thereof in the registry of this court to abide the event of this action.

If the question is, however, now to be reopened, these respondents say that the said bark J. W. Parker was lost by the *vice proprie* of said jute, having been bailed in a green condition, and of known dangerous tendencies for shipment, and that all the loss and damage sustained herein was attributable to the act of the charterers in negligent shipment of such bales of jute in their dangerous condition, and that libellants are not entitled to recover any sum whatever on this action, as the loss to these respondents by said casualty amounts to $25,000 and upwards.

Thirteenth. Further answering, these respondents allege that the libellants are guilty of laches in now bringing said action, for the reason that in December last all the facts were known, and the legal positions were then taken by both parties in interest, and that evidence of the facts was then accessible to these respondents. By the delay, however, of the underwriters on cargo (who are supposed to be the real libellants herein), the respondents have lost the benefit of the testimony of their principal witness, to wit, the master of said bark, who died in April last, before the filing of the libel herein.

Fourteenth. All and singular the premises are true.

Wherefore these respondents pray that for the purpose of narrowing the issues herein, the libellants be required to reply to the seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth

12 articles of the answer, the same as if specific interrogatories in relation thereto were appended; and that the libel herein may be dismissed, with costs.

(8'g'd) JOHN W. PARKER.

Sworn to before me this 25th day of June, 1887.

HENRY H. SINCLAIR,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

WING, SHOUDY & PUTNAM,
Proctors for Respondents.

(Endorsed:) Filed June 25, 1887.

At a stated term of the district court of the United States of America, for the southern district of New York, held at the United States court-rooms in the city of New York, on the — day of May, in the year of our Lord one thousand eight hundred and eighty

Present: Hon. Addison Brown, district judge.

HOWARD D. TROOP *et al.*
vs.
STEPHEN A. RALLI *et al.*

And now J. W. Parker & Co., intervening as agents for the interest of Howard D. Troop and others in the bark Mary A. Troop, appear before the honorable court, and make claim to the said vessel, &c., as the same are attached by the marshal under process of this court, at the instance of Stephen A. Ralli and others, and the said J. W. Parker & Co. aver that they were in possession of the said vessel at the time of the attachment thereof; and the said J. W. Parker & Co., the true and lawful bailees thereof, as agents; wherefore they pray to defend accordingly.

J. W. PARKER & CO., *Agents.*

WING, SHOUDY & PUTNAM,
Proctors for Claimants.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John W. Parker, being duly sworn, deposes and says that he resides in the city of Brooklyn; that he is a member of the firm of J. W. Parker & Co. above named; that the owners of said vessel reside in New Brunswick, and that this deponent is duly authorized to put in this claim in behalf of the owners of the said vessel, and that the said claim is true of the knowledge of this deponent, except as to the matters therein stated on information and belief, and — to such matters he believes it to be true.

J. W. PARKER.

Sworn to and subscribed this 31st day of May, A. D. 1887, before me—

CHAS. C. BURLINGHAM,
Notary Public, City and County of N. Y.

(Endorsed:) Claim of J. W. Parker & Co. Filed May 31, 1887.

14 C. S. District Court, Southern District of New York.

STEPHEN A. RALLI and Ors.)
vs.) Opinion.
HOWARD D. TROOP and Ors.)

Libel to recover $20,752, proceeds of cargo sold at Calcutta in March, 1886.

Sidney Chubb, for libellants.
Wing, Shoudy & Putnam, for respondents.

BROWN, *J.*:

The ship J. W. Parker, of 1,490 tons was chartered by the libellants to load at Calcutta with saltpeter and in jute bales. On the morning of February 18, 1886, as the ship was getting under way, a fire broke out in the forehold, which the men on board the ship and from other vessels in the neighborhood were unable to put out. After a half hour's work it was somewhat subdued; the hatches were put on to smother it, and the pumps were kept playing. Not long after the port authorities came and took general charge of the efforts to put out the fire, pumping large quantities of acid, steam and water into the ship. That night the fire smouldered, all the openings being covered. The following day 552 bales of jute were taken out by the master, when the port authorities required that she should be removed to the flats where the tide could flow over
15 her for the purpose of extinguishing the smouldering fire. The rest of the cargo was subsequently taken out in a damaged condition and sold by the master for $20,723.83, for which sum the libellants, as owners of the cargo, asked a decree.

The defendants claim an offset for a general-average charge in favor of the ship as against the proceeds of sale, on the ground that the ship was sacrificed for the safety of the cargo; the water that was poured in, and that flowed over her after she was scuttled, in order to put out the fire, having practically destroyed the ship, through the expansion caused by the water in the jute bales that had been screwed tightly into the hold. A general-average adjustment was made first at Calcutta and afterwards at New York, the port of destination. By this adjustment, allowing the general-average claim of the ship, the sum of $7,420.48 only was found due to the libellants out of the proceeds of ship and cargo. The libellants having refused to admit their liability for a general-average contribution, that sum has been paid into the registry of the court. The libellants resist the general-average charge on the ground that the fire was caused by the ship's negligence; and that the scuttling and loss of the ship were under the order of the port authorities and not of the master.

1. As to negligence:

It is no doubt the ordinary rule in the law of general average, that where the ship's negligence has made the sacrifice necessary, she cannot recover a general-average contribution from the cargo. Many of the maritime codes expressly so provide; and the text

books so state the rule. See the recent case of the Ontario, *ante*, 222. This proceeds, as I understand, upon the ground that the ship is herself responsible to the cargo for her own neglect. She therefore cannot take from the cargo under the name of general average what she is at the same moment bound to make good and restore

16 by reason of negligence. If that is the foundation of the rule, it cannot apply to those causes of sacrifice for which the ship and owners are not legally liable; and by the British statute, as well as the statutes of the United States, there is no liability for loss by fire "without the owner's fault or privity." Macl. Ship'g, 9121; U. S. Rev. St., § 4282. To deny the owners the benefit of a general-average contribution on the ground of negligence would impose upon them, in effect, a liability for the fire, from which the statute exempts them. This ship belonged to New Brunswick, and the owners are therefore exempted from any liability by reason of this fire, there being no fault or privity on their part. The charter, moreover, provided that "all questions of average should be settled in accordance with the York-Antwerp rules, and with the established usages and laws of the place of destination." Rule 3 of those rules declares that "damage done to the ship or cargo, or either of them, by water or otherwise, in extinguishing fire on board the ship, shall be general average." This rule does not except cases of negligence by the ship, nor require the sacrifice to be made by the master or by his order. In the Antwerp conference of August, 1885, the question was propounded whether the rules should be modified in case the original cause of the loss was the ship's negligence, or the proper vice of the ship or cargo. The solution determined by the conference was that, the rules of common average ought to be applied, even though the danger, the primordial cause of the sacrifice, or expense, had been brought about by the fault of the captain or crew, or of a person interested in the cargo; or by the proper vice of the ship or cargo; the recourse that the fault, or proper vice gives, ought to be kept independent of the rule of common average.

5 Valroger Droit Mar. Appendix, question 32, p. 389; solution 22, p. 405.

17 The cause of the fire, and, therefore, the alleged negligence, are moreover not established in this case with any certainty. The cargo had been covered the night before preparatory to sailing. On the morning of the fire, as the ship's chains were being hove in, one of the seamen was directed to go into the chain locker forward to stow them away. He took a globe lantern and went into the chain locker through a narrow passage between the bales of jute under the deck, and about ten or fifteen minutes afterwards was heard to scream, and at the same time smoke came pouring out of the hatch. The libellants charge that the jute was set on fire by some improper use of the lamp. But there is no proof of this. The lamp may have been taken out of the lantern, or broken accidentally in handling the chains. The respondents claim that the fire was spontaneous, and naturally showed itself soon after

the opening of the hatch gave it air. Jute in bales is liable to spontaneous combustion; and as the seaman lost his life, there is no testimony sufficient to determine with any certainty the origin of the fire. The proceedings of the marine court of enquiry at Calcutta are not competent evidence here. The frequency of fires in cargoes and the difficulty of determining their origin, are said to be among the reasons of the statutes exempting owners from liability for damage for fire.

A regulation of the port of Calcutta required that no lantern should be taken below except by an officer, and only when it was secured by lock and key. There is no proof that the master or officers of this vessel had any knowledge of this regulation. The regulation is a strictly local one. The evidence shows that other foreign vessels at Calcutta had no knowledge of it; and it would seem to have been a dead letter. The port pilot, who was in charge of the ship at the time, was not examined in reference to it. The lantern is proved to have been such as was usual in such vessels,
18 having brass guards with the lamp fastened by a screw at the bottom. The failure of foreign ships to comply with local regulations not brought to their knowledge does not in general constitute a fault. The J. Fraser, 21 How., 184, 188; the New York, &c., *v.* Rea, 18 How., 223; the E. A. Packer, 10 Ben., 520. The question of negligence, as respects general average, must be determined according to the general rules of navigation. Manifestly the use of an unlocked lantern in going below cannot be held to amount to negligence in one port, and not in another port, upon the same voyage and with the same cargo. This was the ordinary ship's lantern secured like those in almost universal use. The use of such a lantern was not in itself negligence. The chief witness for the libellants on this branch of the case, Inspector Forsyth, says twice that it was not unsafe to go below with this globe lantern. It is not at all certain, as above stated, that the lantern caused the fire; or, if it did, that its being unlocked had anything to do with it. I think the claim of general average cannot be rejected on these grounds.

2. Sacrifice:

The libellants contend that the sacrifice of the ship arose from her scuttling; that this was done by the order of the port authorities, and was not by the act of the master; and that the motive was not the preservation of the cargo, but the protection of the port, and of other vessels and property.

By the local law it appears that the commissioners, and under them, the conservator of the port of Calcutta, have a general authority over vessels on fire; and the master is subject to a heavy penalty, in case of fire, for not taking the proper order, and observing their directions (the Calcutta act of 1875, §§ 17, 36). The master, when this fire broke out, was ashore, seeking a tug. The chief officer gave the alarm, and the port officials soon appeared and took the chief direction of
19 affairs. The master several times during the following two days was desirous of having the hatches opened and of removing more bales, which the officials prevented. But it is evi-

dent from their testimony that the fire was at no time subdued until it was "drowned out" by scuttling the ship. Large quantities of carbolic acid, steam and water had successively been pumped into the ship without extinguishing the fire. The master did not object to the scuttling. The chief difference between them was in respect to keeping the hatches open longer for the purpose of removing more of the cargo, to which the officials objected in consequence of the increased draft of air serving as fuel to the flames.

It is perhaps to be inferred that the general authority given to the port officials was either on account of their better knowledge of the mode of dealing with fires likely to arise in cargoes shipped at that port, or for the protection of the port or other shipping which might sometimes require other measures than the masters might adopt; and if it appeared in this case, or if the evidence warranted the inference that their measures were adopted in view of any actual or supposed danger to the port, or to other ships, and that they acted differently than if the common benefit of the ship and cargo alone were considered; in other words, if there was any sacrifice of the ship and cargo for the supposed interests of other property, I should consider the case not one of general average. But there is no evidence to warrant any such inference. This ship was far from shore, and apparently threatened no other property. The circumstances do not indicate that there was any conflict of interests between the ship and the shore; or that the port officials in any degree designed to sacrifice, or did sacrifice, any interest of the cargo to the safety of other property. There was no occasion and no motive for their doing so. The most that can be inferred is that there was some difference of judgment between them and the master as to the amount of exposure that it was prudent to permit to the smouldering fire; and in case of a difference of judgment, the determination must rest with those upon whom the law for the time being imposes the responsibility of action; in this case, the port officials. There is no sufficient reason to conclude that they did not act intelligently and honestly; or that their order to fill the ship with water was not the best thing that could be done for the ship and cargo. The interests of all were apparently identical.

It is sometimes said that the sacrifice, in order to give rise to general average contribution, must be made by the master, or by his order. Wamsutta Mills *v.* Old Colony, 137 Mass., 471, 474. But this is not exact. Such a condition is not an essential part of the right to a general-average contribution. It is sufficient if the sacrifice be made for the common benefit, and by those who for the time being are charged with the control and responsibility. The duty of contribution is one of the oldest maritime rules. It does not rest upon contract, or upon any artificial theory of agency, but upon the fundamental natural equity, that what is sacrificed for the safety of all shall be made good by contribution from all that is thereby saved. The sacrifice is, doubtless, usually made by the master. But his order is not essential. Such a condition forms no part of the prescriptions of most of the maritime codes. Among the

provisions of very many of these codes to be found in the appendices of Lowndes's General Average (4 ed., pp. 351 to 672), I find no such requirement except in the Code of Germany (§ 702). Valroger, commenting on this peculiarity of the German Code, says (5 Droit Mar., § 2006): "An action for contribution cannot be denied simply on the ground that the jettison was made without the captain if it
21 was really necessary." Ulrich, the German commentator, observes upon this text of the German code, that what is meant is, "the commander of the vessel at the time," and that a proper order made by the next officer in command during the master's temporary absence would be a case of general average. Upon the same view he further states that where a pilot is in command he is considered as the master's representative; and that the pilot might order the sacrifice, "in conflict with the master, without depriving the sacrifice of the character of a general average loss" (Havarei-Gesetze, p. 6, 7). In Price *v.* Noble (4 Taunton, 123) general average for a jettison was sustained in the case of a British ship, though the jettison was made by a prize crew put on board upon a capture by a French privateer. In Walker *v.* Insurance Co. (11 Ser. and Rawl., 61) Chief Justice Gibson says, that the "loss must arise from the direct agency of some one acting for the general benefit;" and the general rule requires only that that person shall be some one having lawful authority to determine for the time being. In Lawrence *v.* Minturn, 17 How., 100, 110, Mr. Justice Curtis, speaking of a jettison, says: "It will be deemed to have been necessary for the common safety, because the person to whom the law has extended authority to decide upon and make it, has duly exercised that authority."

Under the local law of Calcutta, the port commissioners for the time being had this authority. They were in the situation of master as respects all measures to be taken to put out the fire, and for the common benefit. To disobey them was a criminal offense in master or crew. For the most part they and the master acted in concert, and upon a difference of judgment as to the length of time it was expedient to keep the hatches off, or to delay filling the ship with water, since fires in jute cargoes were not uncommon in Calcutta, it
22 is probable their judgment was better than the master's, and this may be one reason why this authority was committed to them. Both ship and cargo were subject to the operation of the municipal law of Calcutta so long as they remained in port, and it is that which made the conservator's order equivalent to the master's. This in no way excludes the application of the maritime law as respects contribution. In hundreds of cases the municipal law becomes the basis of the application of maritime rules; cases of pilotage and of statutory liens for supplies are familiar instances. In the case of Wamsutta Mills *v.* Old Colony, *supra*, emphasis was laid upon the fact that the ship was moored to the wharf and subject to the general police authority on shore. This case is different. The ship was not alongside the wharf, but far away; and the conservator's authority over the ship was special. The act of filling and scuttling was a maritime act in the interest of the ship and cargo only, and, as I think, subject to the maritime law. It is not

uncommon that municipal aid is obtained in extinguishing fire. Nelson *v.* Belmont, 21 N. Y., 36. If that is ever to be held sufficient to absolve from the duty of contribution, it is not, I think, in a case like the present. Considering that the whole doctrine of general average rests upon the highest equity, that no technical rules prevent its application to all cases that come within its general purpose; that the York-Antwerp rules were specially adopted by this charter; that there was no opposition of interests in the sacrifice made by filling and scuttling the ship; that the port officials were by law in command while the ship was on fire; that the purpose of the act of sacrifice was the common good of the ship and cargo alone; that the circumstances indicate that there was not in this case any interest of the port, or of other vessels, that in the least influenced the port officials in their action, or the smallest sacrifice of the ship or cargo in reference to any outside interests, and that there is no

23 reason to suppose that the orders were not honestly and intelligently given, or were not such as the officials would have given as actual master, having nothing in view but the common benefit of ship and cargo, I think the claim of general average contribution should be sustained. By the law of this country water damage is a subject of contribution (Heye *v.* N. G. Lloyd, 33 Fed. Rep., 60; 35 do., 705); and in this case, as I have said, the charter expressly adopted the York-Antwerp rules which so declare (rule 3). These rules do not require the master's order. An average bond having been given by the libellants, and the loss being adjudged a proper subject of general average, and no errors being shown in the adjustment, the decree should be for the libellant for the balance stated by the adjustment.

Though the libel does not claim the amount resulting from the general average, but the whole proceeds of the cargo, the amount due the libellants on the average adjustment having been paid into court, it should be decreed to them, under the prayer for general relief. Dupont *v.* Vance, 19 How., 162; The J. P. Donaldson, 21 Fed. Rep., 673.

24 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York on the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable Addison Brown, district judge.

STEPHEN A. RALLI, ALEXANDER A. VLASTO, and LUCAS E. RALLI, Surviving Partners of the Firm of Ralli Brothers, Libellants.

against

HOWARD D. TROOP and —— TROOP, Composing the Firm of Troop & Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Part Owners of the British Bark J. W. Parker, Respondents.

This cause having been heard upon the pleadings and proofs, and having been argued by the respective advocates, and the sum of

87,120.48 having been deposited in the registry to the credit of the cause for amount owing by the defendants for general average; now, on motion of Wing, Shoudy and Putnam, proctors for the respondents—

25 It is considered and decreed, that the libellants and respondents are respectively entitled to general average contributions for the water damage and losses incurred in and about the bark J. W. Parker and cargo in consequence of the fire upon her in Calcutta on February 18, 1886—and no errors having been shown in the adjustment made up by Jacob R. Telfair on December 7th, 1886, the libellants are decreed the amount shown to be due them under said adjustment as charterers and as owners of the cargo of saltpeter and jute butts shipped on board said bark J. W. Parker. And the amount due the libellants for the average contribution for the jute mentioned in the libel being 85,335, and for the saltpetre, which was totally destroyed on said ship by water, being the sum of 81,283; it is further adjudged that the libellants recover for said jute and saltpetre average adjustment the sum of six thousand six hundred and eighteen dollars (86,618), with interest thereon from the date of the denial of the libellants' motion to withdraw the same from the registry upon defendants' opposition thereto on the issue raised by the answer, to wit, the 28th day of June, 1887, to this date, amounting to six hundred and ninety-two $\frac{68}{100}$ dollars (8692.68), being in all seven thousand three hundred and ten $\frac{68}{100}$ dollars (87,310.68). And the said average adjustment having also allowed to libellants the sum of two hundred and ninety $\frac{51}{100}$ dollars (8290.51) for advances and profits on the charter, and two hundred and twenty-seven $\frac{76}{100}$ dollars (8227.76) for certain disbursements of Ralli Brothers incurred in connection with the said adjustment, both making five hundred and eighteen $\frac{29}{100}$ dollars (8518.29). It is further adjudged, that libellants also recover said sum of five hundred and eighteen $\frac{27}{100}$ dollars (8518.27) so due to them therefor according to said adjustment, being altogether the sum of seven thousand eight hundred and twenty-eight $\frac{95}{100}$ dollars (87,828.95). And the respondents' deposit of seven thousand four hundred and twenty $\frac{48}{100}$ dollars (87,420.48) in the
26 registry of this court, now amounting with interest to the sum of seven thousand six hundred and nineteen $\frac{98}{100}$ dollars (87,619.98), the libellants accordingly are hereby decreed said sum of seven thousand six hundred and nineteen $\frac{98}{100}$ dollars (87,619.98), to be paid them out of the registry of this court.

And it is further adjudged and decreed, that the libellants above named recover from the respondents the further sum of two hundred and eight $\frac{97}{100}$ dollars (8208.97), being the residue of the amount as aforesaid decreed and found due to them, together with the amount of clerk's fees upon the deposit aforesaid, being seventy-seven $\frac{89}{100}$ (877.89) dollars, making together two hundred and eighty-six and $\frac{86}{100}$ (8286.86) dollars.

This decree is without prejudice to the claim of the Thames & Mersey Ins. Co. for disbursements allowed the company in general average against the respondents herein.

And it is further ordered, that unless this decree be satisfied or proceedings thereon stayed by appeal within the time prescribed by law, and provided by the rules and practice of this court, the stipulators for value on the part of the respondents cause the engagement of their stipulation to be performed, or show cause why execution should not issue against them to enforce satisfaction of this decree.

ADDISON BROWN.

(Endorsed:) Final decree. Decree resettled as within in lieu of original decree. N. Y., April 2, 1889. Filed April 4th, 1889. A. Brown.

27 United States District Court, Southern District of New York.

STEPHEN A. RALLI *et al.*, Libellants,
vs.
HOWARD D. TROOP *et al.*, Respondents.

SIRS: Please take notice, that the libellants herein hereby appeal from the final decree entered herein on the 28th day of March, 1889, and resettled on the 2d day of April, 1889, and entered as resettled on April 4, 1889, to the next circuit court to be holden in and for the southern district of New York.

Dated New York, April 15th, 1889.

Yours, &c.,

SIDNEY CHUBB,
Proctor for Libellants.

To Wing, Shoudy & Putnam, Esqs., proctors for respondents: Samuel H. Lyman, Esq., clerk, &c.

(Endorsed)—Notice of appeal.—Filed April 5th, 1889.

28 United States Circuit Court, Southern District of New York.

STEPHEN AUGUSTUS RALLI, ALEXANDER ANTHONY VLASTO, and LUCAS EUSTRATIOS RALLI, Libellants and Appellants,
vs.
HOWARD D. TROOP and —— TROOP, Composing the Firm of Troop & Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Owners of the British Bark J. W. Parker, Respondents.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named libellants and appellants respectfully shows:

That on or about the 6th day of May, 1887, these libellants and appellants exhibited their libel with a clause of foreign attachment in the district court of the United States for the southern district of New York against Howard D. Troop and James Troop, copartners, composing the firm of Troop & Son, ship-owners of St. John, N. B. (James being fictitious), and John Doe and

Richard Doe, lately owners of the British bark J. W. Parker of St. John, N. B., praying, among other things, that the respondents be condemned to pay the libellants' claim in the sum of $22,000 for the value of the undelivered balance of the libellants' shipment of jute butts laden on board the respondents' ship J. W. Parker at Calcutta, with interest and costs, as will more fully appear by reference to said libel. That process of foreign attachment was duly issued as prayed for, and such proceedings were had thereupon that certain of the respondents, part owners of the said bark, duly appeared in said action, and on the 31st day of May, 1887, filed a bond for the value of their interests attached under said process in the sum of $15,000 with a stipulation for libellants' costs; and thereafter the respondents above named filed their verified answer herein, and on the same day they paid into court the sum of $7,420.48, as by reference to said answer will more fully appear.

That thereafter the libellants moved the court upon all the papers and proceedings in the case for leave to withdraw the said sum so deposited in the registry. That said motion was heard on the 28th day of June, 1887, by the district judge and denied, no order being entered thereon.

That thereafter and on the 3d day of January, 1889, the said cause came on to be heard before the Honorable Addison Brown, district judge, upon the proofs and depositions of the respective parties, and the said district judge having advised thereon, did, on or about the 4th day of March, 1889, file his opinion in writing, ordering a decree to be entered in favor of the libellants as therein directed.

That thereafter and on the 26th day of March, 1889, the said district judge made a final decree herein, whereby, among other things, the libellants were adjudged to recover the money paid into court with the accrued interest thereon, and also to recover from the respondents the sum of $—, with clerk's costs, as will more fully appear by reference to said final decree.

That thereafter the libellants duly moved on the 28th day of March, 1889, to resettle said final decree, and on or about the 2d day of April, 1889, the said district judge decided said motion ordering the decree to be resettled as directed by him, and on the 4th day of April, 1889, the said final decree as resettled was entered and filed with the clerk of the court, wherein it was adjudged that the said libellants recover the said sum paid into court, with the accrued interest thereon, amounting to the sum of $—, and also recover of the respondents the further sum of $—, all of which will more fully appear by reference to said final decree as resettled.

And these libellants and appellants are advised and insist that the said final decree is erroneous, inasmuch as the libellants were and are entitled to be decreed the amount of their said claim with interest and costs, and that the said respondents are not entitled to the contribution in general average adjudged by said decree, and that the said decree is erroneous in other respects.

And these libellants and appellants have for these and other

reasons appealed from the said final decree to the next circuit court to be held in the said district, and on the said appeal they intend to have the said cause heard anew on the pleadings and proofs in the district court, and pray that the said decree may be reversed, with costs, and that they may have a decree for the amount of their said claim, with interest and costs.

And the libellants and appellants pray that the record and proceedings of the district court may be returned to the said circuit court, and that the said decree of the district court may be reversed, with costs, and that the said libellants and appellants may have such other and further and different relief as to the said circuit court may seem just.

Dated New York, April 12, 1889.

SIDNEY CHUBB,
Proctor for Appellants.

(Endorsed:) Petition of appeal. Filed April 15, 1889.

31 Know all men by these presents that we, Stephen Augustus Ralli, Alexander Anthony Vlasto, and Lucas Eustratios Ralli, as principals, and Angus J. Macdonald and Charles Myers, as sureties, are held and firmly bound unto Howard D. Troop and —— Troop, composing the firm of Troop & Son, of St. John: and Gustavus Vaughan, James Albert Delap, John W. Parker and Mark Shaw, in the sum of five hundred dollars, to be paid to them, their executors, administrators or assigns, to the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our executors and administrators jointly and separately by these presents.

Sealed with our seals, and dated the 13th day of April, 1889.

Whereas, Stephen Augustus Ralli, Alexander Anthony Vlasto and Lucas Eustratios Ralli, as libellants and appellants, have appealed to the circuit court of the United States for the southern district of New York, in the second circuit, from the final decree of the district court of the United States for the said southern district, in a suit in which the said Ralli and others are libellants against the said Howard D. Troop and others, are respondents:

Now, therefore, the condition of this obligation is such, that if the above-named appellants, Stephen A. Ralli *et al.*, shall prosecute their said appeal with effect and pay all damages and costs which shall be awarded against them, if they shall fail to
32 make said appeal good, then this obligation shall be void, and otherwise the same shall be and remain in full force and effect.

STEPHEN A. RALLI,
ALEXANDER A. VLASTO, AND
LUCAS E. RALLI,
By SIDNEY CHUBB,
Libellants' Proctor.

Sealed and delivered and taken and acknowledged, this 13th day of April, 1889, before me—

JAS. W. HALE,
(83d)
[L. S.] *Notary Public, N. Y. County, 4 Hanover Street.*

A. J. MACDONALD. [L. S.]
CHAS. MYERS. [L. S.]

UNITED STATES OF AMERICA, *ss:*

Angus J. Macdonald and Charles Myers, being duly sworn, do, each for themselves, depose and say that he, said Macdonald, resides in the eastern district of New York, and he, said Myers, in the southern district of New York, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

A. J. MACDONALD.
CHAS. MYERS.

Sworn to before me, this 13th day of April, 1889.

JAS. W. HALE,
[L. S.] *Notary Public, N. York County, 4 Hanover Street.*

This bond approved as to form and amount of sufficient surety. Dated New York, April 13, 1889.

WING, SHOUDY & PUTNAM,
Proctors for Appellees.

(Endorsed:) Bond on appeal.—Filed April 15, 1889.

33 United States District Court for the Southern District of New York.

STEPHEN A. RALLI *et al.*
vs.
HOWARD D. TROOP *et al.* } Vol. 34, page 322.

I, Samuel H. Lyman, clerk of the district court of the United States of America, within and for the southern district of New York, do hereby certify that the following is a correct statement of the moneys now in the registry of court to the credit of the above-entitled action, viz:

May 31, 1887. Received from respondents the sum of	$7,420 48
March 23, 1889. Interest on the above sum to date	199 50
April 13, 1889. Received from respondents (deposited by them under decree of April 4, 1889)	286 86
Making a total of	$7,906 84

In witness whereof, I have hereunto signed my name and caused the seal of said district court to be affixed this 3d day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

[L. S.] SAMUEL H. LYMAN, *Clerk.*

34 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 10th day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The Honorable William J. Wallace, circuit judge.

STEPHEN A. RALLI, ALEXANDER A. VLASTO, and Lucas E. Ralli, Surviving Partners of the Firm of Ralli Brothers, Libellants & Appellants,

against

HOWARD D. TROOP and ——— TROOP, Composing the Firm of Troop & Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Part Owners of the British Bark "J. W. Parker," Respondents.

Final Decree.

The appeal of the libellants herein having been heard upon the apostles, and having been argued by the respective advocates, and the sum of $7,420.48 having been deposited in the registry of the district court by the respondents, it is now by the court—

Considered, adjudged, and decreed that the respondents have a lien for a contribution in general average upon the proceeds of the libellants' cargo sold by the master of the said bark "J. W. Parker" at Calcutta, and that the libellants recover the amounts shown

35 to be due them under the adjustment of general average made up December 7th, 1887, at New York, being for jute and saltpetre, the sum of $6,618; for advances and profits on the charter, the sum of $290.51; for certain disbursements of the libellants at Calcutta, the sum of $227.76, together with the sum of $692.68, interest on the said sum of $6,618, as allowed by the district court, making in the aggregate the sum of seven thousand eight hundred and twenty-eight $\frac{25}{100}$ dollars ($7,828.95); and it appearing that the said amount and the clerk's fees thereon had been deposited in the registry by the respondents prior to the appeal of the libellants herein, it is—

Further ordered, adjudged, and decreed that the said amount, with any interest accumulated thereon since April 4, 1889, less any clerk's fees thereon, be forthwith paid to the libellants or to their proctor from the funds in said registry; and it is—

Further ordered, adjudged, and decreed that this decree is without prejudice to the claim of the Thames & Mersey Marine Insurance Company, Limited, for disbursements allowed the company in the said adjustment of general average; and it is—

Further ordered, adjudged, and decreed that the respondents herein recover from the libellants the sum of sixty-nine $\frac{20}{100}$ dollars ($69.20), their taxed costs of appeal in this court, and, unless

36 this decree be satisfied or proceedings thereon be stayed by appeal within the time prescribed by law and the practice of this court, that the sureties on the stipulation for costs and the bond on appeal on the part of the libellants cause the engagements of

their said stipulation and bond to be performed, or show cause why execution should not issue against them to enforce satisfaction of this decree.

WM. J. WALLACE.

Notice of settlement of within decree waived.

WING, SHOUDY & PUTNAM,
Proctors for Respts.

Received from the registry $7,840.16 in payment of the amount adjudged to the libellants by the above decree.
Dated N. Y., Dec. 30th, 1889.

SIDNEY CHUBB,
Proctor for Libellants.

Endorsed: United States circuit court, southern district of New York. Stephen A. Ralli *et al. vs.* Howard D. Troop *et al.* Final decree. Sidney Chubb, proctor for app'lts, 50 Wall street, New York city. U. S. circuit court. Filed Dec. 10, 1889. John A. Shields, clerk.

37 Circuit Court of the United States, Southern District of New York.

STEPHEN A. RALLI *et al.*, Libellants and Appellants,
against
HOWARD D. TROOP *et al.*, Respondents and Appellees.

Findings of Fact.

1. Libellants, who constituted the firm of Ralli Bros., of New York and Calcutta, on October 25th, 1885, chartered the British bark J. W. Parker to load jute and saltpetre for a voyage from Calcutta to New York. Exhibit No. 1 in the apostles (p. 168) is a copy of this charter.

2. The vessel accordingly proceeded to Calcutta, and, while moored in the river there, was fully laden by libellants with 7,592 bales of jute butts and 1,062 bags of saltpetre, for which the master signed the usual bills of lading, undertaking to deliver said cargo at Boston.

3. On the morning of February 18th, 1886, a port pilot came on board and took charge of unmooring preparatory to taking the bark to sea. All the hatches had been tightly covered the night before. As the anchor-chain was hove in it was necessary for a man to go into the chain locker forward to stow the chain. To reach the locker the fore hatch had to be opened. Thence
38 one could go through a narrow passage about three feet wide and three feet high between the jute bails to the chain locker, which was about 8 feet forward of the hatch. Ernest Edwards, an able seaman, who had been several months on the bark, took a globe lantern, which did not have a lock, but in which the lamp was screwed into the body of the lantern, and, by the mate's orders,

went through the fore hatch into the chain locker to stow chain. This was between 9 and 10 o'clock a. m. A few minutes afterwards he was heard to scream. At the same time smoke was seen coming out of the ventilators. The men who tried to rescue him were driven back by the smoke in the fore hatch. Edwards was suffocated. His body was afterwards found in the chain locker.

4. Thereupon the second officer of the bark caused an alarm to be sounded by ringing the vessel's bell, and from sixty to seventy men from the crews of the neighboring vessels came to his assistance. These men brought buckets with them; water was poured from the buckets into the fore hold. A force-pump on the bark and another force-pump brought from a ship near by were both playing large streams of water down the hold. After half an hour of this work the hatches were covered with wet sails and tarpaulins, but the pumps were kept playing into the chain lockers.

5. Between 11 and 12 o'clock and while both force-pumps were still being steadily worked the port authorities came with fire-engines and took direction of the vessel, and on the return on board of the master he found the port authorities in charge. The port fire-engines, charged with fire-extinguishing chemicals, were placed through holes cut in the deck. During the night the fire-engines continued pumping in steam, and in the morning the fore hatchway was opened and six hoses were played on the fire in the fore hold, but as this seemed to increase the fire the hatches were put on again. The port authorities then moved the ship and put her aground. In the forenoon the captain removed 552 bales of jute from the bark and desired to remove more, but the port authorities objected and forbade it because of the danger of increasing the fire.

During that day the port authorities pumped water in the ship, and during the night and following morning the fire was extinguished by the vessel being scuttled. The master believed that it was prudent and feasible to discharge more cargo at the time he was prevented from doing so by the authorities. The measures taken by the mate before the port authorities took charge of the ship and those subsequently taken by the port authorities were the best available to extinguish the fire and to save greater loss upon the cargo.

6. That the fire was communicated to the said cargo by the lamp carried by the seaman Edwards while on his errand to the chain locker; but whether the occurrence happened by the accidental breaking of the glass of the lantern or whether by his act in removing the lamp from the lantern or whether by the lamp becoming unscrewed or how the occurrence took place cannot be ascertained. Jute or jute butts in bales is very inflammable cargo, and a lamp or lantern in which the flame is exposed cannot safely or prudently be carried through such a narrow passage as Edwards had to pass. At the time there was in force a regulation of the port of Calcutta which had been duly promulgated by the proper authorities as follows: "Rule 30. No person shall smoke or use naked lights of any description in the hold or between decks

of any vessel lying in the port. Closed lanterns secured by a lock and key and in charge of an officer of the vessel shall alone be taken between decks and into the hold." Neither the master nor the officers of the bark had any notice of this regulation.

7. The jute had been packed in the bark's hold as closely as the compressed bales could be forced together by screws. The effect of the water poured on the jute was to expand it and spring up the decks, break the hatch coamings, and draw out the timbers. The raising of the decks and starting of the beams was observed early in the morning of the day after the fire. The swelling continued even after a portion of the cargo was removed. The J. W. Parker became a wreck not worth repairing.

8. The master, when the port authorities allowed him to resume charge of the vessel, acting for the best interests of all concerned, proceeded to save the residue of the cargo that remained in the vessel. By the outlay of about $8,000 for men and lighters
41 to get the damaged jute out of the bark and for repacking it in condition for sale he was able to land some in godowns or warehouses. He consulted the firm of Turner, Morrison & Co., who were agents of the underwriters on cargo, and followed their directions as to landing the cargo before sale. Surveys were then had, and the cargo was condemned and sold as unfit to go forward, and realized on such sale $20,752.83. The ship was also condemned as unseaworthy and was sold for 8,000 rupees, equal to about $2,716.24.

8 A. That the said master, second officer, and a seaman of said bark duly made and extended, under oath, a protest against the said fire and against the said actions of the said port authorities in depriving the master of his said command and in refusing to permit of the discharge of cargo after it had been commenced and in causing the said vessel to be stratided or scuttled and in all owing the tide water to rise over her deck; that the said protest is printed at page 161 *et seq.* of the apostles herein.

9. On March 8th, 1886, the owners of the bark J. W. Parker offered to turn over all the cargo to the libellants if they should sign an average bond. This offer was made in New York and was declined.

10. The 552 sound bales of jute were transhipped by the captain and were delivered to libellants' agents at Boston. An average bond was then executed by libellants, by which it was provided that the general average should be adjusted by Jacob R. Telfair, an average adjuster at the port of New York. This was in pur-
42 suance of the following clause of the charter-party:

"All questions of average to be settled in accordance with York-Antwerp rules and the established usages and laws of the port of destination, to be stated by average adjusters appointed by charterers' agents and approved by owners."

11. On December 7th, 1886, a general average adjustment was made up in accordance with the York-Antwerp rules and
43 the usages of said port. The libellants presented to their adjuster various claims for their disbursements, which were

allowed as general average, as were also certain disbursements by the underwriters upon the cargo.

12. By the adjustment as made up as aforesaid it was found and stated, after allowing the general average due to the vessel, that the libellants, as owners of the jute, were entitled to an average contribution of $5,335, and to the further sum of $1,283 for the loss of their saltpetre, together with the sum of $290.51 for advances and profits upon their charter-party, and $227.76 for certain disbursements of Ralli Bros. incurred in connection with said average adjustment. The owners of the vessel were willing to abide by this adjustment, but libellants or their underwriters declined to accept the same.

13. Some months afterwards this action was begun. The respondents thereupon paid into court the full amount found due to libellants and to their underwriters by said adjustment, and gave security for the residue of libellants' demand.

14. The district court having made a decree sustaining said average adjustment, but condemning respondents in interest upon the sum of $5,335 as the contribution due for the loss on the jute, also in the sum of $77.89, the amount of the clerk's fees on respondents' deposit, the respondents thereupon paid into that court the further sum of $286.86, making the full amount of the decree of the district court.

11 *Conclusions of Law.*

1. The extinguishing of the fire at Calcutta was a general average act, and the water damage so incurred was a general average sacrifice, for which contribution is due from all interests thereby benefitted.

2. An average bond having been given by the libellants, and the loss being adjudged a proper subject of general average, and no errors being shown in the adjustment, the libellants are entitled to a decree for the balance stated by the adjustment as aforesaid and for no more.

3. The respondents are entitled to their costs in this court.

Dated Nov. 9, 1889.

WILLIAM J. WALLACE,
Circuit Judge.

WALLACE, *J.:*

I agree fully with the views of the district judge as expressed in his opinion, both as to the facts and the law of this case, and deem it unnecessary to indulge in any more extended discussion of the questions involved.

Endorsed: Circuit court of the United States, southern district of New York. Stephen C. Ralli *et al. vs.* Howard D. Troop *et al.* Copy. Findings of fact and conclusions of law, Wallace, J., with corrections by Judge Wallace. Wing, Shoudy & Putnam, proctors for resp'dts, appellees, 45 William St., N. Y. U. S. circuit court. Filed Jan. 7, 1890. John A. Shields, clerk.

45 United States Circuit Court, Southern District of New York.

STEPHEN A. RALLI, ALEXANDER A. VLASTO, and LUCAS E. RALLI, Surviving Partners of the Firm of Ralli Brothers, Libellants and Appellants,

vs.

HOWARD D. TROOP and JAMES TROOP, Composing the Firm of Troop & Son, of St. John, N. B., and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Part Owners of the British Bark "J. W. Parker."

Bill of Exceptions.

The above-entitled cause came on for trial in the city of New York before the Honorable William J. Wallace, judge of the circuit court of the United States for the second circuit, on the twenty-second day of October, 1889, on the appeal of the libellants from the final decree of the district court of the United States for the southern district of New York, made and entered in the above-entitled cause on April 4, 1889. The counsel for the libellants read the libel of the libellants and counsel for the respondents read the answer as the same are contained in the apostles transmitted from said district court to said circuit court.

The counsel for the libellants, to sustain the issues on their
46 behalf, then read the charter-party of the vessel J. W. Parker and the bills of lading and the respondents' stipulation for value of property attached as the same were presented in the district court and as they are found in said apostles. They are as follows:

LIBELLANTS' EXHIBIT No. 1.

Charter-party.

Sailing ship J. W. Parker, for New York.

It is this day mutually agreed between Lloyd Lowe & Co., agents of the good ship J. W. Parker, Captain —— ——, of the measurement of 1,190 tons register, or thereabouts, on the one part, and Messrs. Ralli Brothers, merchants and charterers, on the other part—

That the said ship being tight, staunch and strong and in every way fitted for the voyage, shall receive and load from the said charterers, or their order at Calcutta, a full and complete cargo, to consist of linseed or light freight or measurement goods; charterers having the option of shipping up to 100 tons of cutch in bags or boxes, and up to 200 tons of saltpetre; also of shipping up to one-fourth the quantity of jute or jute cuttings or jute rejections, that may be shipped in bales of up to 500 lbs. each; the remainder to consist of light bales not exceeding 400 lbs. which the said charterers bind themselves to ship, or cause to be shipped, not exceed-

ing what she can reasonably stow and carry over and above
47 her tackle, apparel, provisions and furniture, and being so
loaded shall herewith proceed to New York, or as near thereabouts as she may safely get and there deliver the same.

(The act of God, the Queen's enemies, restraint of princes and rulers, fire and all and every other danger of the seas, rivers and navigation of whatever nature and kind soever during the said voyage, always mutually excepted.)

The measurement of any goods on which freight is payable by measurement to be taken by sworn measurers appointed for the purpose, ship paying expense of the same.

Freight payable in cash on right and true delivery of the cargo at the rate of 83 per customary American ton, now in use in Calcutta for saltpetre, and 85½ for all other goods.

Freight on weight goods to be paid on net weight delivered.

Ship to be moved to and moved at any safe anchorage required by the charterers who also have the option of naming the dock or wharf for discharge.

If moved more than once, charterers to pay the expense of second moving.

Ship to engage any stevedore and clerk charterers may appoint, provided their rates are not higher than those charged by other stevedores and clerks.

Thirty (30) working days are to be allowed for loading (if
48 the ship be not sooner despatched), commencing from the
time the ship is cleared of her inward cargo, stiffening excepted, and ready to load on twenty-four hours' notice from agents, 10 days on demurrage to be allowed, if required, at rs. 300 per day, payable as incurred to the agents of the vessel, after which the ship to be at liberty to proceed full or not full, charterers paying dead freight on vacant space as ascertained.

The cargo to be brought to and taken from alongside the ship at the risk and expense of the freighter or consignee.

The ship's officer to sign mates' receipts for any marks and numbers distinctly marked upon the goods, and the captain to sign bills of lading for any marks and numbers duly entered upon such mates' receipts. The captain to sign clean bills of lading at any rate of freight required by the charterers without prejudice to this charter-party, but at not less than the average chartered rate, unless the difference be paid in cash.

No hooks to be used in stowing or delivering the cargo, and no bags to be cut.

All requisite mats and dunnage to be provided by the ship.

Lay days at charterers' option not to commence before 15th January, 1886, and the charterers to have the option of cancelling this charter-party, if ship be not arrived at Calcutta free of inward cargo, stiffening excepted, and ready to load on or before 20th February, 1886; also if the ship be not in a seaworthy condition by
49 the time her lay days should commence.

The agents of the ship to be held liable for demurrage of boats.

All questions of average to be settled in accordance with York-Antwerp rules, and the established usages and laws of the port of destination, to be stated by average adjusters appointed by charterers' agents and approved by owners.

Cash for vessel's ordinary disbursements at port of loading not exceeding £1,800, to be advanced the master, if required by him, at the current rate of exchange for six months' documentary bills, subject to insurance and 2½ per cent. commission. Said advance to be endorsed by the master on the bills of lading, and to be deducted from on the vessel's arrival at discharging port.

Ship to pay 2½ % address commission to charterers' agents in New York (who for such consideration shall be required to do the ship's inward business, but the captain to have the option of placing the ship in the hands of the owners' agent, relieving charterers' agents of all responsibility with respect to collecting freight) and the native brokerage of 4 annas per ton, together with 2½ % address commission to charterers' agents in Calcutta.

Vessel not to carry any creosoted sleepers outward.

The captain to have an absolute lien on the cargo for all freights, dead freight and demurrage.

Charterers' liability to cease on the completion of shipment of cargo, provided same be worth the freight at port of discharge.

Charterers to have the privilege of underletting part or whole of the vessel.

Should the vessel while on her voyage meet with disaster and have to take refuge in any of the under-mentioned ports, the vessel to be consigned to charterers' agents there. Agents are: At Point de Galle—Clark, Spence & Co.; Mauritus, Ireland, Fraser & Co.; Natal—George Christopher, Cato & Co.; Algoa bay, Mackie, Dunn & Co.; Simon's bay—W. Anderson & Co.; Saint Helena—Solomon, Moss Gideon & Co.

Penalty for non-performance of this agreement the estimated amount of freight.

London, the twenty-eighth day of October, 1885.

Agents of the ship:
(8'd) LLOYD, LOWE & CO.

Witness to the signature of Lloyd, Lowe & Co.:
(8'g) A. C. CHALLIS.

Charterers of the ship:
(8'g) RALLI BROTHERS.

Witness to the signature of —— ——:
—— ——.

28. 10. '85.

A true copy of the original in our possession.
LLOYD, LOWE & CO.

5 % brokerage due Lloyd, Lowe & Co. on signing this charter.

51 *Bills of Lading.*

LIBELLANTS' EXHIBIT 2A AND 2B. (Duplicate.)

Ralli Brothers.
R. 7,592 bales.
8400.

Shipped, in good order and condition, by Ralli Brothers, in and upon the good ship or vessel called the "J. W. Parker," whereof *its* master for this present voyage, —— —— and now lying in the River Hooghly, and bound for Boston, seven thousand five hundred and ninety-two bales jute butts, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of Boston. (The act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever excepted), unto order or to their assigns, he or they paying freight for the said goods, at the rate of 86 (six) gold dollars, a ton of 40 cft. as per margin, and all other conditions as per charter-party with average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to two bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Calcutta, this 17th day of Feb., 1886.

J. McMANUS.

Weight and contents unknown.

Received from Messrs. Ralli Brothers, the sum of rs. 4,213 10— rupees four thousand two hundred and thirteen and annas
52 ten only, for the disbursements of the barque J. W. Parker under my command, the said sum to be deducted from the freight on the within-mentioned 7,592 bales jute butts on settlement thereof at the rate of exchange, one shilling, six pence and fifteen thirty-seconds of a penny (ex. I | 6 $\frac{15}{32}$ *d.*) per rupee.

Calcutta, 18th February, 1886.

J. McMANUS, *Master.*

INS. CO. OF N. A.
CHINA MUT. INS. CO.
S. & P.

19. 7. '86.

LIBELLANTS' EXHIBIT 2C AND 2D. (Duplicate.)

Shipped in good order and condition by Ralli Brothers in and upon the good ship or vessel called the J. W. Parker, whereof is master for this present voyage —— —— and now lying in the River Hooghly and bound for Boston, one thousand and sixty-two bags saltpetre, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid

port of Boston (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted), unto order or to their assigns, he or they paying freight for the said goods at the rate of 81½ (one and one-half gold dollars) per ton of 20 cwt. net delivered with average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to two bills of lading, all of this date and tenor, one of which being accomplished, the others to
53 stand void.

Dated in Calcutta this 30th day of Jan., 1886.

J. McMANUS.

Weight and contents unknown.
p. pro RALLI BROTHERS.
INS. CO. N. A.
CHINA MUT. INS. CO.
S. & P.

19, 7, '86.

District Court of the United States for the Southern District of New York. In Admiralty.

Filed the 31st day of May, 1887.

Stipulation for Value.

Entered into pursuant to the rules and practices of this court.

Whereas a libel was filed on the — day of May, in the year of our Lord one thousand eight hundred and eighty-seven, by Stephen A. Ralli, Alexander A. Vlasto, and Lucas E. Ralli, surviving partners of Ralli Brothers, against Howard D. Troop and others, lately owners of the British bark J. W. Parker, of St. John, N. B., for the reasons and causes in the said libel mentioned; and whereas the ship Minister of Marine and bark Mary A. Troop are in the custody of the marshal under the process of foreign attachments issued in pursuance of the prayer of the said libel, and Howard D. Troop and others having appeared and made claim to their property
54 as attached, and said respondents depositing herewith in the registry of the court, as a tender of the sum due libellants, seven thousand four hundred twenty $^{4}/_{100}$ dollars, and the value of the attached interests of the respondents in said vessels in custody having been fixed by consent at fifteen thousand dollars, as appears from said consent endorsed hereon, now on file in said court, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the said respondents or their sureties execution for the above amount may issue against their goods, chattels, and lands:

Now, therefore, the condition of the stipulation is such that if the stipulators undersigned shall at any time, upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to Wing, Shoudy & Putnam, Esquires, proc-

tors for the respondents aforesaid, abide by and pay the money awarded by the final decree rendered by the court or appellate court, if any appeal intervene, then this stipulation be void; otherwise to remain in full force and virtue.

HOWARD D. TROOP AND OTHERS.
By J. W. PARKER & CO., *Agents.*
J. W. PARKER.
JOHN WILLIAMS.
J. W. ELWELL.

Taken and acknowledged this 31st day of May, 1887, before me—
CHARLES C. BURLINGHAM,
Notary Public, City and County of New York.

55 SOUTHERN DISTRICT OF NEW YORK, *ss:*

John Williams and J. W. Elwell, parties to the above stipulation, being duly sworn, each depose and say that he resides in the eastern district of New York; that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

——— ———.
——— ———.

Sworn to this 31st day — May, 1887, before me—
CHARLES C. BURLINGHAM,
Notary Public, City and County of N. Y.

Recorded this 31st day of May, 1887.
Approved ——— —, 188–.

Value of attached interest in property for purposes of bonding fixed by consent at $15,000 and within stipulation and sureties approved.

SIDNEY CHUBB,
Proctor for Libellants.

The libellants thereupon rested.

Counsel for the respondents, to maintain the issues on their behalf, thereupon read from said apostles the testimony of JOHN W. PARKER, which tended to show that the respondents above named were registered owners of $\frac{42}{64}$ of the bark J. W. Parker.

Counsel then read in evidence the average bond.

RESPONDENTS' EXHIBIT A.

Form Prescribed by the Association of Average Adjusters of the United States.

56 *Average Bond.*

Whereas, it being represented that the bark J. W. Parker, whereof John McManus is, or lately was master, having on board a cargo of jute and other merchandise, in which we are interested as owners, shippers or consignees, when ready to sail from the port of Calcutta

on or about the eighteenth day of February, 1886, bound for a port in the United States, caught fire and was damaged and destroyed thereby, resulting in her condemnation and sale, and in consequence thereof a transshipment took place of 522 bales of jute cuttings on board the steamship Clan Lamont, to be conveyed by her or other substituted vessel to Boston, Mass., via Suez canal and London; and that thereby certain losses and expenses were incurred, and other and further losses and expenses consequent thereon may yet be incurred, and that such losses and expenses may be a charge, by way of general average or otherwise, upon the vessel, her freight and cargo, or either of them:

Now, therefore, we the subscribers, owners, shippers or consignees of such of the cargo of said vessel as we have severally described and set opposite our respective signatures hereto, in consideration of the premises and of the delivery to us respectively of such cargo, or so much thereof as may be saved, without retention pending an adjustment of said losses and expenses, do hereby for ourselves, our
respective executors and administrators, severally and re-
57 spectively, but not jointly, nor the one for the other, covenant and agree to and with Messrs. Troop & Son of St. John, N. B., owners or agents of the owners, of the said vessel, and with one another, that the losses and expenses aforesaid, or so much thereof as, upon an adjustment of the same, to be stated by Jacob R. Telfair, according to the laws and usages of this port in similar cases, may be shown to be a charge upon the said cargo, or upon any of the cargo of said vessel which might be received by us, shall be paid by us respectively, according to our several and respective parts or shares thereof, unto the said Messrs. Troop & Son, or their order, when such adjustment is completed and due notice given thereof:

Provided, however, that if any of said cargo has been shipped under bills of lading containing an agreement that the York-Antwerp rules shall be the rules of adjustment, such agreement shall not be affected hereby, but in all other respects this bond shall remain in full force.

And we further promise and agree to furnish said adjusters, upon their request, all information which they may deem necessary to a correct adjustment of this case.

This bond may be executed in several parts of like tenor and date, the whole of which are to constitute but one bond, with the same effect as if each of said parts were severally signed by us.

In witness whereof, we have to these presents respectively
58 set our hands, in the city of Boston, this — day of July, one thousand eight hundred and eighty-six.

Consignees.	No. of packages.	Amount of invoice.	Where insured.
(Sgs.) *p. p.* Ralli Brothers.. P. J. Forting.....	552 bales butts.		

Counsel for the respondents thereupon read from the apostles the testimony of Richard O. Lovett, who gave testimony tending to prove that he was an average-adjuster at New York for 18 years past, associated with Jacob R. Telfair, who has been an adjuster for more than thirty years. On December 7, 1886, he had made up the average adjustment in this case, and that the same had been made up according to the customs and usages of the port of New York; that he was acquainted with the York-Antwerp rules, and that he had also conformed to them in this adjustment, and that rule 3 of said rules was as follows:

RULE III.

Extinguishing Fire on Shipboard.

"Damage done to a ship and cargo or either of them by water or otherwise in extinguishing a fire on board the ship shall be general average, except that no compensation be made for damage done by water to packages which have been on fire."

59 That no allowance had been made to the ship except for voluntary water damage; that each interest in the adjustment was assessed $1.1457 per cent.; that an allowance was made also for the saltpetre in the cargo of the J. W. Parker which had been dissolved by water. An allowance had also been made in the adjustment to libellants for their telegraphic outlays and other disbursements; that he thought the bills for these outlays had been presented to him by Mr. Phillips, the manager for the libellants' New York house; that very likely the witness might have asked him for them.

That after making up said adjustment the only objection ever made thereto was the following note:

"NEW YORK, *December* 13, 1886.

"Jacob R. Telfair, Esq., No. 56 Wall street, city.

"DEAR SIR: On behalf of the underwriters interested in the cargo of the bark 'J. W. Parker,' burnt at Calcutta February 18, 1886, I am instructed to inform you that they have adopted the resolutions as offered by the adjustment committee of the national board of marine underwriters as below:

"Resolved, That this committee is of opinion—

"First. That this is not a case for general average contribution, as the water was pumped into the ship by direction of the city authorities and not by the order of the master or any officer in charge of the vessel.

60 "Second. That the case should be adjusted in accordance with the rule and custom of Calcutta, where a final separation of interest took place.

"I am—

"Yours very respectfully,

(8'g'd) "J. RAYMOND SMITH, *Secretary.*"

Counsel for respondents thereupon read the deposition of HARRIS C. PICKLES, taken May 11th, 1888:

I was last mate of the ship Lewis C. Troop. I have followed the sea for six years and six months. I shipped on the J. W. Parker at Montevideo, about October, 1885; from there to Calcutta, India, as second mate. I still remained connected with that ship at the time of the fire. I stayed on board of her until she was discharged—after the fire. John W. McManus was master of the J. W. Parker when she went to Calcutta and up to the time of the fire. The captain was not on board her at the time of the fire. She was completely loaded, ready for sea. I had to do with loading her with jute cuttings in bales, 400 lbs. to each bale. She was as full as ever she could be, the bales screwed in with jack-screws. A negro named Edwards was sent down there to the chain locker. He had a globe lantern, which went with a screw at the bottom. You put it up in and then turn it round, so that it screwed fast and was perfectly
secure. I don't know what kind of oil was in it. I presume
61 it was vegetable oil. We had some on board. The next thing was I heard him screech. The sound came from right down below—in the chain locker. I turned round and saw smoke issuing from the chain locker, and I sung out for him to come out if he could. I heard no answer. We sounded the pumps shortly after we had finished pouring water on the fire. The pumps were abaft the mainmast and we got 18 inches. It takes 14 inches to draw, so that there was four inches to pump out. That would come within two or three inches of the ceiling. It was before the port wardens came. They came about eleven or a quarter past eleven. At that time the hatches had all been covered, as I have described. The force-pumps were still going at the chain lockers when they came. Aside from the force-pumps, the pouring of water from buckets had all been stopped. The port authorities, when they came on board, took charge of the ship. I gave no orders after that with regard to putting out the fire; nothing at all. They had charge of the ship. I did not see what the port authorities did when they came on board. I understand they pumped some kind of a chemical into the ship afterwards. Captain McManus came on board shortly after the port authorities arrived. From the time the port authorities came on board the vessel to the time when the ship was pumped out the captain or the officers had no charge of the extinguishing of the fire nor of the ship. In my judgment, with
62 the pumps we had and the means we were taking to put out the fire, it would have been put out without the aid of the port authorities.

That after the port authorities came and took the direction the other ships that had been moored near by were all shifted away from the J. W. Parker except the ship Leading Wind.

The witness also described the chain locker and stated that he saw the lamp when it was taken out after the fire; that it was then ruined—all smashed and battered up; that the lamp had been an ordinary ship's lantern, just the same as ships carry generally; that,

in the judgment of the witness, the fire would have been finally quenched with the pumps and means on the bark without the aid of the port authorities; that Capt. McManus, who was master of the bark, had since died on shipboard, near the Cape of Good Hope.

Counsel for the respondents thereupon read from the apostles the deposition of REUBEN W. BRAY, master of the ship Leading Wind, to the effect that he had been in Calcutta twice; was there at the time of the fire on the J. W. Parker and had been called upon the survey, and saw the lamp that was taken from the chain locker after the fire; that it was then broken, but was an ordinary globe lantern with brass guards, such as are used on board ships, the same kind that other people use there and as was used by the witness; that it was not dangerous to carry into a ship's hold where jute was, if burning vegetable oil.

63 Counsel for the respondents then read the deposition of HENRY BRODIE CONBY, master of the ship Gileruix, to the effect that he made eight voyages to the port of Calcutta and return; that the ship Gileruix was then chartered to the libellants, and that he had carried five whole cargoes of jute; that during all the time he had been in Calcutta he had never seen, neither on his own ship or any ship loading there, locked lanterns or known of their being used.

Counsel for respondents thereupon read the deposition of JAMES ALBERT DELAP, who had formerly been master of the bark J. W. Parker, and described the construction of the vessel, and that her chain locker was of the kind in common use in provincial ships.

Counsel for respondents then read the deposition of WILLIAM A. BURGESS, mate of the ship Leading Wind, who described the breaking out of the fire and the efforts made by other vessels to extinguish it.

Counsel for respondents also read the testimony of JOHN F. BAXTER and of FRANCIS A. MARTIN, the latter to the effect that he had been a shipmaster for many years and a marine surveyor in the port of New York for the last twenty-nine years; that during that time he had inspected vessels in the Calcutta trade, carrying jute; that he had never seen or heard of a globular lantern secured with lock and key in addition to the ordinary mode of screwing in the light from the bottom of the lantern.

64 Libellants' counsel in rebuttal read from the apostles the testimony of LAWRENCE PHILLIPS to the effect that he had been for some twelve years past with Messrs. Ralli Bros. in New York; that an average bond on March 8, 1886, had been offered to them for signature, but the witness, after consulting their adjuster, declared that they could not interfere with the business of their Calcutta house, and that they couldn't sign a bond for property that they were not going to receive.

Libellants' counsel then read the deposition of EATON WALLACE PETTY, taken under commission issued to Calcutta, to the effect that at the time of the fire on the J. W. Parker he was deputy conservator of the port of Calcutta and had been such since October, 1881; that he was on board the bark when she was on fire; that he went on board near noon of the 18th of February, 1886, and assisted to

superintend the fire brigade on board, but after the vessel had been pumped full of water and the tide had risen and covered the hull of the vessel the ship was pumped out again and floated; that the business of the port officials was then finished with the vessel.

That the witness believed that the lamp was shown to him after the ship was floated and while he was on board. As well as he could remember, it was an ordinary globe lantern; that he only saw it in the hands of Mr. Forsyth, a police officer; that the witness was of the opinion that it was unsafe to take a lantern of that description into the hold of a ship laden with jute or into the
65 vessel's chain locker; that it was an infraction of port rule No. 30.

Seventh interrogatory. State whether the officers or crew exercised any authority or directions with reference to the proceeding and means taken to subdue said fire. Did they or any of them give any orders or make any suggestions or requests at any time that a course or method of procedure different from that in fact adopted should be pursued? If yea, state by whom and to whom said orders or suggestions or requests were made and whether or not they were obeyed or adopted.

State whether the master or officers or crew disregarded or attempted to disregard any of the orders or directions given by those in charge of the operations for extinguishing said fire. If any such disobedience had been made or attempted had you any authority to subdue the same; and, if so, what? And state whether or not you were then prepared to exercise the same, and in what manner.

A. To my knowledge the officers and crew did render assistance, but I cannot say whether or not they exercised any authority or directions or gave any orders or made any suggestions or requests in connection with the proceedings adopted to subdue the fire. The master, so far as I know, did not disregard, as far as I remember, any orders or directions given by myself. No orders were given by me to the officers or crew. I could exercise my authority in case of any disobedience under the Indian ports act, XII of 1875, which provides for the punishment of disobedience of orders. In
66 case of disobedience I could have taken out a summons against him in the ordinary course.

Being cross-examined, the witness stated that he did not say that it was unsafe to take a closed lantern into the hold, but that it should, both in make and security, be guarded by lock and key, in the hands of a trustworthy officer, and of such material that it could not be easily broken; that the witness remembered that the lantern, in a very broken state, was produced before a marine court of inquiry, of which he was a member; that this was about ten or twelve days after the burning of the ship; that the witness considered the carrying of a lantern like that into the hold of the ship was an infraction of the rules and regulations of that port.

Counsel for libellants then read the deposition of HENRY DE SMIDT, also taken under the same commission at Calcutta, to the effect that he was a marine surveyor and had followed that occupation for eight years; that he knew the J. W. Parker, and was on board just

as the fire was put out; that he only saw the lantern when produced in the marine court of inquiry; that a lantern properly locked would not be unsafe to take into the hold of the J. W. Parker.

Counsel for the libellants then read the deposition of DUNCAN MCKELLAR, taken under the same commission at Calcutta, to the effect that he was also a Lloyds surveyor at that port; that he went on board the J. W. Parker while she was on fire; that he never saw
67 the lantern taken from the chain locker, but that assuming that the lantern was not locked, and one from which the burner could be removed, the witness would not consider it safe to take it into the chain locker of a vessel packed around with jute. The witness did not know the port rules well enough to say whether the taking of a lamp of that description into the hold of a vessel would or would not be an infraction of the rules.

Being cross-examined, the witness stated that he did not think it would be unsafe to take a good closed lantern below, but he thought it would be unsafe to go with any lantern into a narrow passage among jute where a man could not stand.

Libellants' counsel thereupon read the deposition of ALEXANDER FORSYTH, taken under the same commission, to the effect that he was a police officer, and was on board the ship J. W. Parker from the time she took fire until the fire was extinguished; that after the fire was extinguished and the vessel pumped out the witness found the frames and part of the globe of the lantern on top of a water tank of the fore hold, and also found some of the broken glass from the lantern; that the lantern had been a round globe lantern, with a brass bottom and brass-wire protector, and small brass top with a ring in it, such as is used as a riding light. The glass was broken and the lamp was missing. The witness also stated that there was no chain locker on the ship; that the anchor chains were kept in the space aft of the windlass, the sides of which were built up with
68 bales of jute, with wood put in here and there; that the space from the fore hatch into the chain locker was about two feet in height and about three feet broad; that in the opinion of the witness it was quite safe and prudent to take such a lantern lighted into the chain locker of the vessel, so long as the lamp was not removed from the globe. It would have been an infraction of the port rules, because the rules require the lantern to be locked and the key kept by an officer; that the witness did not mean to swear that it was unsafe to take a closed lantern of the description previously given into the hold of the J. W. Parker.

Libellants' counsel further read the deposition of SAMUEL L. B. CRAYMER, taken under the same commission at Calcutta, to the effect that he was an assistant in the Calcutta house of Messrs. Ralli Brothers, and that they also have a house trading in New York of the same name; that there was correspondence between the Calcutta house and the New York firm regarding the J. W. Parker and cargo in the year 1886, but that the witness was unable to produce it.

Libellants' counsel then read the deposition of GEORGE CHARLES FARR, taken under the same commission, to the effect that he was

a solicitor and a notary public in Calcutta; that the port authorities are officially designated as the "commissioners for making improvements in the port of Calcutta;" that they are a duly incorporated body and have power to make port rules concerning the management of vessels.

69 There are rules described by competent authority concerning the management of vessels and the conduct of the master and crew touching the mooring and wharfing of vessels and the use of fires and lights on board.

I produce a copy of such rules (marked Exhibit F), extracted from the Calcutta Gazette, which is the official gazette of the government of Bengal. These rules were made and promulgated by the local government—that is, the government of Bengal. The authority of the local government to make such rules is derived under the Indian ports act, being act XII of 1875, of the governor general of India, in council. Section 7 empowers the local government to make such rules. I produce a copy of the Indian ports act, 1875, printed and published under the government of India (marked Exhibit G).

The rules I have produced and which are marked Exhibit F were duly promulgated by publication in the Calcutta Gazette, the official gazette of the government of Bengal, in July, 1866. I have spoken heretofore of rules which came into force in July, 1886, but there were port rules upon the same subject prior to that date. The port rules existing between August, 1879, and July, 1886, are printed and published on page 355 and the following pages down to 369 of the book I now produce, and which is marked Exhibit H, being a volume containing, amongst other things, the rules, by-laws, regulations, and notifications relating to the part of Calcutta, printed by the government of Bengal, and published under the authority of the port commissioners. These last-mentioned rules of the

70 port of Calcutta were promulgated by publication in the Calcutta Gazette of 18th of August, 1879.

Rules published in the Calcutta Gazette and made by the local government under the Indian ports act, 1875, have the force of law in so far that all persons within the limits of the ports or places therein mentioned are conclusively presumed to know them. No actual notice of their existence need be given to any person before they can be found guilty of a breach thereof.

A marine court sat to investigate the circumstances of the fire on the ship J. W. Parker. The marine court was constituted under the authority and pursuant to the provisions of the Indian merchant shipping act, act V of 1883 of the legislative council of India—*i. e.*, the governor general's council. The members composing the court were Mr. F. J. Marsden, the chief presidency magistrate of Calcutta, president; Captain H. De Smidt, a marine surveyor of Calcutta, and Captain A. Adamson, commander of the ship Queen of Scots, members. The original record of the appointment and proceedings of the said court and the testimony taken thereon and the report thereof cannot be annexed to my deposition because they now form part of the records of the marine court. I produce a copy

of the whole of the record of the appointment and proceedings of the said court and the testimony taken thereon and the report thereof. The copy of the record I produce is issued by and under the signature of Mr. J. D'Silva, the clerk of the marine court, who is the officer in charge of the original record, and it is, to the
71 best of my belief, a true and correct copy of the original record and of the whole thereof. The copy of the record which I produce consists of eighteen half sheets and is marked Exhibit I.

The person charged by law with the duty of taking measures for the extinguishing of fires breaking out on vessels within the port of Calcutta is the conservator of the port. His power and authority is prescribed in the Indian port act, 1875, a copy of which I have produced and which has already been marked Exhibit G.

The port commissioners of Calcutta are H. J. Reynolds, chairman; G. H. Simmons, vice-chairman; E. V. Westmacott, Robert Steele, J. Scobell Armstrong, Sir H. L. Harrison, Sir A. Wilson, R. D. Mehta, J. Stevenson, C. E. Smyth, D. J. Zemin, A. L. Messimer, and A. Gwyn, commissioners. In February, 1886, the port commissioners were H. J. Reynolds, chairman; W. Duff Bruce, who is now in England, vice-chairman; J. J. J. Keswick, H. L. Harrison, G. Irving, W. H. Grimley, R. Miller, C. H. Moore, H. B. H. Turner, W. Craik, Capt. G. O. B. Carew, J. Scobell Armstrong, and R. Steel. The harbor master of the port of Calcutta in 1886 was Mr. L. Behrend.

The existing port rules, those produced by me and marked Exhibit F, were last revised on the 24th of June, 1886, and took effect from the date of their publication in the Calcutta Gazette, as before mentioned.

All charges of the alleged breach of the port rules are investigated by one of the police magistrates of the town of Calcutta,
72 whose court is a court of summary jurisdiction and whose decisions are not reported.

The papers I have produced purporting to be the record of a court of Calcutta are copies of the proceedings in the marine court. The name of the court is the marine court. There are no permanent officials thereof other than Mr. D'Silva, the clerk in charge of the records. The officials are from time to time appointed for the purposes of each case as it arises by the local government—that is, the government of Bengal. It is a court consisting of not less than two nor more than four persons, and the local government may from time to time fix the place for making the investigation for which the court is constituted. The Indian merchants shipping act, act V of 1883 of legislative council of India, is the statute or law which empowers the local government to create the marine court, and the same statute defines its powers and jurisdiction.

The Indian merchant shipping act, act V of 1883, has been printed by and under the authority of the government of India and published in pamphlet form. It was so printed and published in February, 1883. It has also been printed and published in the official gazette of India—called the Gazette of India—in 1883. It has also

been published in a volume entitled the Legislative Acts of the Governor General in Council of 1883, published by Messrs. Thacker, Spink & Co., of Calcutta, in the year 1884.

73 Respondents' counsel thereupon objected to so much of the testimony as refers to an *ex parte* investigation at Calcutta as not admissible against them; also to any alleged statements made or taken in such proceedings.

Counsel for libellants claimed to offer the statements as admissions made by the master and crew of the bark, and therefore receivable against the respondents.

The court stated that it would receive only the statements of the master and officers of the bark as such admissions, but not those of other persons taken upon said inquiry.

The libellants' counsel excepted to so much of the ruling of the court as excluded the statements of Alexander Forsyth, Ernest Frederick Schneider. Said Forsyth was fully examined as a witness under libellants' commission. Ernest Frederick Schneider was the pilot in charge of the J. W. Parker at the time of the fire.

EXHIBIT 1. Annexed to Deposition of George Charles Farr.

Government of Bengal Resolution.

Municipal Department Marine.

Dated CALCUTTA, *the 1st March*, 1886.

Read—

The following papers regarding the outbreak of fire on board the British ship J. W. Parker on the 18th February, 1886, while the vessel was in moorings:

74 Letter from the port officer, Calcutta, No. 848, dated the 26th February, 1886, and enclosure.

In accordance with the provisions of sec. 7 of act V of 1883 (the Indian merchant shipping act) the lieutenant governor is pleased to appoint the gentlemen named in the margin to be members of a court of inquiry for the purpose of making an investigation into the cause of the outbreak of fire on board the British ship J. W. Parker.

President:
Mr. F. J. Marsden, chief presidency magistrate, Calcutta.

Members:
Capt'n H. De Smidt, marine surveyor.
Capt'n T. Adamson, commander of ship Queen of Scots.

The deputy legal remembrancer is appointed to conduct the prosecution on behalf of the government.

Order.

Ordered that a copy of the resolution be forwarded to Mr. J. F. Marsden for information and guidance, to the port officer of Calcutta for information and guidance and for communication to Captains H. De Smidt and T. Adamson, and to the legal remem-

brancer for information and for communication to the deputy legal remembrancer.

(83d) R. H. WILSON,
Off'g Sec'y to the Gov't of Bengal.

Outbreak of fire on board the British ship "J. W. Parker."

THE 6TH MARCH, 1886.

75 Present:

F. J. Marsden, Esq., chief presidency magistrate, president.
Captain H. de Smidt, marine surveyor; T. Adamson, master of the British ship Queen of Scots. } Members.

Read government resolution constituting the court.
Mr. Kilby, on behalf of government.
Copy report handed to Mr. Kilby.

JOHN MCMANUS, on solemn affirmation (the witness objects to take an oath):

I am master of the British ship J. W. Parker, of 1,190 tons, a wood and iron ship. On the 18th of February last a fire occurred on board. I was not on board when the fire broke out. As soon as I heard of it I went back to the ship, and arrived there somewhere about midday. I found some person from the port commissioners in charge of the vessel. I arrived in port about 22nd January last. The pilot gave me a tide-table, but I do not know if he gave me a copy of the port rules or not. I do not know if any officer is especially in charge of the lamps on board my ship. I never inquire about that; that is the chief officer's business.

On the 18th February last I went ashore about 8.30 a. m. I do not consider that everything was done that could be done to
76 put out the fire. On coming on board I wanted to take off the fore hatches at once and play water in, but the port officer refused and said he would arrest me if I interfered. The port officer had what he called acid in the hold of two steamers, and that acid he forced into my vessel through hose. He continued to do this all night until he had no more acid, which was some time before daylight.

I also wanted to get the main and after hatches off and save cargo, but the port officer refused to let me, and they kept all the hatches closed. After she had been burning for sixteen hours I was allowed to take off the main and after hatches, and I got cargo boats alongside and saved 540 bales of cargo. There was no sign of fire in the main and after hatch.

If I had been allowed to discharge cargo when I first wanted to I could have saved five thousand bales undamaged. When the chemicals were finished water was poured in and the vessel beached. The vessel was filled with water and sunk. I cannot tell at present what damage the vessel has suffered. The height of the 'tween decks is about seven feet. After loading there was a passage about six or eight feet long from the fore hatch to the chain locker. I

have not seen that passage myself. That passage is the only way in or out of the chain locker. My ship was unmoored and going to leave the port when the fire broke out. The fore part of the vessel was loaded with jute cuttings.

(S'd) J. McMANUS.

77 THOMAS MERCER GRIFFITHS, on oath:

I was chief officer on the J. W. Parker when the fire broke out, on the 18th February. It broke out somewhere about 10.30 a. m. I had ordered a man named Edwards to go into the chain locker and stow the cable. This was at about ten o'clock. He went down and returned, saying he could not see. I told him to get a light. The carpenter used to be in charge of the lights. I only joined the ship on 7th February. I saw no copy of the port rules, but I have been here before and have seen them, but have never studied them. I caught a glimpse of Edwards going into the chain locker with a lamp. I was on the forecastle head and cannot say if the lamp was locked or not.

About a quarter of an hour later I heard Edwards call out from below that the ship was on fire. I had been passing chain down to Edwards. A couple of links had caught. He released them, and the chain fell a link or two, and a few minutes after that Edwards called out the ship was on fire, and as he said this I saw smoke coming from the chain pipe on deck and through the fore hatch. I at once jumped down into the fore hatch, but could not get to the chain locker because of the smoke and fire. There was a passage about three feet high and three feet wide on the top of the bales of jute from the fore hatch to the chain locker, and the passage was about four or five feet long, and that was the only way in or
78 out of the chain locker. The chain was coiled in a tray on the 'tween decks. The 'tween decks were about eight feet high. When in the chain locker a man would be surrounded on all four sides by the jute cuttings.

This plan A appears to me to be correct. The bread tank had two tiers of jute under it. The bread tank was on the port side of the locker. The bread tank formed part of the chain locker. As I went down the fore hatch I called to Edwards, but got no reply. People from the shore came on board almost at once, and the fire-engines arrived about three-quarters of an hour after the fire broke out, and the Hetty came some time after that; but before the engine came we threw water down the hatch and closed it. Until this time I have never been in a ship that had no chain locker. I thought it was unusual to stow jute in this way, viz., the bare jute around the chain without any protection.

I saw to the stowing of the jute from the fore hatch forward, and stowed it under the captain's orders. I had closed the fore hatch before the port commissioners' people came.

(S'd) T. M. GRIFFITHS.

ALEXANDER FORSYTH, on oath:

I am inspector of police. I received a subpœna to serve on Mr. Pickles, the second officer of the ship J. W. Parker. He refused to take the subpœna, so I put it on his shoulder and told him the subpœna was to attend the marine court at the port commissioners' office this day at 12 o'clock. I served the subpœna at 6.15 a. m. to-day.

79

(It appearing to this court that the witness is material to this case — order a warrant to issue for his arrest under section 14, act V of 1883.)

I was on board the J. W. Parker on Saturday, the day the fire was extinguished, and cut away the planks on the fore part of the fore hatch to get down to the chain locker, and found this portion of a lantern on the after part of the bread tank. I could not find the lamp of the lantern. It is not a lantern that locks. I found the body of Edwards lying with his head against the port chain and his feet over to port.

(8'd) A. FORSYTH.

NEILE EVERSON, on oath:

I was carpenter of the J. W. Parker on the day the fire broke out. I was in charge of the lamps and trimmed them. On the day of the fire I did not trim the lamp that Edwards took below. I do not know who did trim it. This broken lamp was one of our ship's lamps and was kept in the forecastle, and it was a kerosene lamp. There was no lock to it and any one could open it. I did not see Edwards go below with the lamp.

(8'd) NEILE EVERSON.

LUCIE GUISEPPE, on oath:

I was on board the J. W. Parker when the fire broke out. I did not see Edwards go below with the lamp. I was in the head forecastle all the time.

(8'd) LUCIE GUISEPPE.

80 ERNEST FREDERICK SCHNEIDER, on oath:

I am an assistant harbor master and was on board the J. W. Parker when the fire broke out, on the 18th February. Just before the fire broke out they were heaving the chain in. I went aft and was writing a note and heard the cry of "the ship is on fire," and I rushed forward and saw the first and second officers coming out of the fore hatch. The smoke was too dense for any one to go below.

(8'd) ERNEST FREDERICK SCHNEIDER.

HARRIS CHRISTOPHER PICKLES, on oath:

I am the second officer of the J. W. Parker and was on board when the fire broke out, on the 18th February. That day I gave

the order to go down into the chain locker and stow the chain to a man named Edwards. I saw him go down. First he went without a light, and then came up, saying he could not see. I told him to get a light, and he got a globe lantern from, I think, one of the forecastles. It was not a locked lantern. We have not got a lantern on board that has a lock and key. I saw Edwards go down with the lantern, and about ten or fifteen minutes later he called out that the ship was on fire, and I saw smoke issuing from the chain pipes and fore hatch. The chief officer went below, then he came up, and I went down the fore hatch. This Exhibit A is correct. I have been before in the passage that leads to the chain locker.

81 I could only get through it on my hands and knees. The passage was about six or seven feet in length and about three feet in height and width. You would have to get down about four feet from the passage on the chain. I did not see the lantern found after the fire. I cannot say how the fire was caused. The carpenter has charge of the lamps.

H. C. PICKLES.

(87d)

Report.

On the 18th of February last the ship J. W. Parker, of 1,190 tons burden, and loaded with jute cuttings and saltpetre, was unmoored and about to leave this port.

The second officer, Mr. Pickles, gave an order to a colored man named Edwards to go into the chain locker and stow the chain as it came down. The man went below, but returned, saying he could not see. He was ordered to get a light, and he appeared to have got an ordinary globe kerosene lantern from the forecastle and taken it below with him. A few minutes afterwards Edwards called out from below, "The ship is on fire." Both the chief and second officers appear to have jumped down below at once, but were unable to render Edwards any assistance, being driven back by the smoke and fire.

As soon as all hope of saving Edwards' life was over the hatch was closed and efforts were made to extinguish the fire by throwing water down. Officers from the port commissioners appeared shortly on the scene and firstly carbolic-acid gas and then steam

82 and subsequently water were pumped down, but the fire was not extinguished and the vessel was ultimately filled with water and sunk.

After the fire had been put out the lantern was found on the top of a bread locker, but the lamp was not in it.

We have no doubt that the man Edwards took the lamp out of the lantern to enable him to see better, and that either he knocked it over or a gust of air caught the flame and set fire to the jute. The fire seems to have originated in or near the passage, thus cutting off the man's only chance of retreat.

The place where the chain was kept was surrounded by bales of jute, and the only means of ingress or egress was through a passage 6 or 8 feet long and about 3 feet square on the top of the bales, and through which a man could just crawl on hands and knees. See

Exhibit A. We wish to record that we consider it most dangerous for a vessel of this size not to be provided with a proper chain locker, and it will be observed that the sides of the square forming the chain locker were formed of bales of jute.

The lantern used was an ordinary unlocked one, and the taking it down below was in direct contravention of the port rules.

The 9th March, 1886.

(S'd) J. MARSDEN.
" H. DE SMIDT.
" T. ADAMSON.

True copy.
(S'd) J. D'SILVA, *Chief Clerk.*

83 POST OFFICE, CALCUTTA, 13, 9, '87.

Libellants' counsel further read in evidence the ship's protest, which is as follows:

LIBELLANTS' EXHIBIT B OF MAY 11TH, 1888.

By the public instrument of protest hereinafter contained—

Be it known and made manifest unto all people that on the nineteenth day of May, one thousand eight hundred and eighty-six, personally came and appeared before me, Henry Adkin, notary public, duly authorized, admitted, and sworn, residing and practicing at Calcutta, in the East Indies, John McManus, master of the barque or vessel J. W. Parker, of the burthen one thousand nine hundred and ninety tons or thereabouts, belonging to the port of Annapolis, Nova Scotia; Harris C. Pickles, second mate, and John James Hodge, able seaman, of the said vessel, who did severally, duly, and solemnly declare and state as follows—that is to say: That the said vessel was on the 18th day of February last lying at No. 2 Hastings moorings, in the port of Calcutta, fully loaded for a voyage from Calcutta to Boston, United States, with a cargo consisting of 100 tons or 1,062 bags saltpetre and 7,592 bales jute cuttings, shipped by Messrs. Ralli Brothers, merchants of Calcutta, the vessel being then tight, staunch, and strong, well-manned with a crew of 18 hands all told, and well victualed and found in every re-
spect fit to perform her said intended voyage; that on the
84 said 18th February at 9.30 a. m. Mr. Snider, harbor master, came on board to unmoor the ship; that at about 10.15 a. m., the bow chains being unshackled and the windlass being manned to heave in the slack, a colored seaman named Ernest Edwards was sent into the chain locker with a globe lamp to stow the cables; that at about 10.30 a. m. this man called from below that the ship was on fire, and at the same time volumes of smoke were seen coming up the fore hatchway; that this appearer, Harris Christopher Pickles, and the other officers of the said vessel and two men tried to get below to save the said Ernest Edwards, but, the jute being in a blaze, the smoke prevented any one staying below, and the said Ernest Edwards did not come up, being evidently suffocated; that

the crews from the neighboring ships being sent for to assist, a quantity of water was poured down the forward ventilator and fore hatchway, after which they were covered up with a sail and all ventilation closed; that at about 11.45 a. m. on the same day the port fire-engines came alongside, and their hoses, charged with fire-extinguishing chemicals, were at once played through holes cut in the deck; that the port authorities took charge of the ship, and on the return on board of this appearer, John McManus, who had been on shore to engage a tug to tow the said vessel to sea, he found such authorities in charge, and they refused to allow him to interfere; that the said authorities then moved the said vessel into the in-shore berth, and at about noon Mr. E. I. King, of Messrs. Ralli
85 Brothers, the ship's agents, came on board. In the evening two gangs of natives engaged by the port officials came on board to pump the ship and send down the sail yards, et cetera, and the ship was pumped out dry at 9 p. m. The fire-engines were pumping in steam through holes in the deck and through the forward ventilator; that at 6 p. m. this appearer, John McManus, wanted to commence discharging cargo out of the main and after hatches, but Mr. W. Duff Bruce, the vice-chairman of the commissioners for making improvements in the port of Calcutta, the chief executive of the port authorities, who was on board the said vessel, objected to this being done, and the said port authorities being in charge as aforesaid no cargo was discharged, although this appearer, John McManus, verily believes that had he been allowed to discharge cargo a very considerable portion would have been saved dry and the ship would not have been injured; that during the night the fire-engines continued pumping in steam constantly up to 7. a. m. on Friday, the 19th *idem*, when the port authorities and the agent came on board; that the fore hatchway was then opened and six hoses were played onto the fire in the fore hold, but as this seemed to increase the fire the hatches were put on again; that the harbor master then moved the ship and put her aground, a number of lascars being engaged in unbending sails and sending down fore-royal-yards and all stores being sent into a lighter and on board the American ship Leading Wind, to which ship also were sent the captain's and crew's effects; that at about 8 a. m. the port authorities allowed the discharge of the
86 cargo to be commenced from the main and after hatchs, there being no sign of smoke or fear of fire at either of the hatchways; that a number of natives were employed discharging cargo, and 552 bales were discharged, and then the said Mr. Bruce gave orders to stop the discharging, and after the ship was aground she was pumped full of water by direction of the port authorities, although there was still no sign of fire or smoke in either main or after hatchway; that as the fire was still burning in the fore hold the hoses of the fire-engines continued to play constantly on it; that the port authorities had full charge of the vessel as aforesaid, this appearer, John McManus, and his officers not being allowed to interfere; that the high tide during the night of the 19th *idem* completely covered the vessel to the starboard rail, the port side being

quite under water; that in the afternoon of this day all the stores except the beef and pork were got back from the Leading Wind, some coils of rope that were in the lazarette being saturated with water; that on Saturday, the 20th *idem*, at daylight, after the water had left the ship, it was found that she had become a wreck, the deck being lifted and the cabin-house, etc., gutted out. The fire-engines were employed pumping the water out of the ship, and as the fire was still burning forwards about the bow timbers the men were employed cutting away the deck forward and on the forecastle and playing hoses were required; that the body of the colored seaman Edwards was found and sent ashore; that it was found
87 that everything on board the ship had been destroyed by mud and water, and a quantity of ship's fittings, spare spars, etc., had floated away when the ship was submerged; that the stevedore's men were engaged discharging wet jute at all hatchways, and at 2 p. m. the ship was pumped out dry; that in the afternoon the port authorities sent men from several ships on board, who sent down the top-gallant-yards and started the top-gallant-masts, during which work a great quantity of the ship's gear aloft was recklessly destroyed, and the lanyards of the rigging cut, six coils of new rope being used up in discharging the cargo and sending down the spars; that it was stated by the crews of the vessels that were sent on board that they received the port authorities' orders to cut the ship's gear; that at 4.30 p. m., the fire being out, the port authorities gave up charge of the vessel, and this appearer, John McManus, took command; that thereupon the crews of the other vessels left, and the ship's own crew sent down the foretop-gallant-mast; that of the six coils of new rope that had been used for the cargo, etc., three coils were 4-inch hemp rope (lanyard and bolt) and 3 coils 2½-inch manilla; that the steam fire-engine was kept alongside all night in case of the fire breaking out again; that at 4.30 p. m. the steamer Hetty, which was alongside on the port side, left, and in doing so broke the forward chain-plate guards on the port side, cutting the fore brace and breaking the lower block, and also
damaging the main chain-plate guards; that it was found
88 that three spare spars that were on the port side and three new tarpaulins were lost when the ship was under water, and that in the transit of stores a great portion of the captain's and officers' effects had been lost; that on Sunday, the 21st *idem*, the steam fire-engine remained alongside, pumping the ship as required, the water being apparently the drainings from the jute, and at high tide it was found that the ship was afloat, the maintop-gallant-mast being sent on deck in the forenoon; that on the 23rd *idem* the fire-engine still remained alongside, pumping the ship as required, her own hoses being used, the crew being employed the whole day in sending down the top-gallant and royal gear from aloft and cleaning out the cabins and alley-ways and cook's room, so as to stow the gear and new rope; that on sending down the gear from aloft it was found that a great quantity had been cut, and also the gaskets on the yards; that on the 23rd *idem* Mr. D. McKellar, surveyor to Lloyds' agents; Captain James Campbel, of the ship St. Patrick, and

Captain R. W. Bray, of the ship Leading Wind, surveyed the cargo of the vessel and recommended its immediate discharge, as appears from the survey report, hereto annexed and marked A; that all sails and hauling lines, hawsers, etc., were brought alongside in a cargo boat, and were taken on board in the afternoon; that at 3 p. m. the steam fire-engine left the ship, and at 7 p. m. all the men that had shipped at Calcutta left the ship, their services being no longer
89 required. And these appearers, John McManus and Harris Christopher Pickles, for themselves declare that on the 24th *idem* the personal effects of this appearer, John McManus, were surveyed by Captain Thomas Adamson, of the ship Queen of Scots, and Captain J. A. Patterson, of the ship Glenlin, and their report thereon is hereunto annexed and marked B; that on the same and following days the discharge of cargo was commenced and continued with all dispatch, and the cleaning and pumping the ship as required, nothing of note happening, with the exception of the custom-house officer coming on board on a few occasions, till the 19th March, when, the pumps being broken, the starboard one was taken out and the hose of the force-pumps put down in the well; that the cargo as discharged was opened and dried at Goosry, where it was stored, and on the 22nd day of March, 1886, so much of the cargo as had been landed and dried was surveyed by Mr. D. McKellar and Captain Bray, who recommended the same to be sold for the benefit of the concerned, as appears from the survey report, hereto annexed and marked C; that nothing further of note happened, the same general work of discharging cargo, painting and cleaning the ship, and making petty repairs continuing until April 5th, 1886, when, on taking up the ground tier of jute, it was found that the saltpetre had all melted, there being nothing left but the bags; that on the 7th April the discharging of the cargo was finished and ballast taken on board: that the total quantity of jute cuttings, exclusive of the said
90 552 bales saved from the said ship, amounting to 31,758 maunds and 33 seers, which were sold by public auction by Messrs. W. Hawworth & Co., produce brokers of Calcutta, on the 24th March, 1886, at rates varying from 1–15 to rs. 2–1 per maund, realizing, after deducting sale commission and weighing charges, the sum of rs. 61,122.39, as appears from the account sale of the said Messrs. W. Haworth & Co., hereunto annexed and marked D; that the expense of landing, opening out, and drying the said jute cuttings amounted to rs. 14,829.06; that on Thursday, the 8th *idem*, at 6 a. m., the said D. McKellar and W. H. Norman, dock master and superintendent of the Ganges Steam Navigation Company, came on board to survey the ship and left again at 10 a. m.; that on the 9th *idem*, at 7 a. m., the said surveyors again came on board and left at 10.30, and again on the 10th *idem* the surveyors came on board at 7 a. m. and left at 10 a. m.; that nothing further of note happened till the 14th *idem*, when 398 gunny bags (in which the saltpetre had been contained) were sold at rs. 6 – per hundred and discharged, and on the following day further 662 gunny bags were sold at rs. 6 – per hundred and discharged; that the report

of the last said mentioned surveyors on the damage to the said ship is hereto annexed and marked E; that on the 19th *idem* the said appearer, John McManus, obtained an estimate for the complete repair of the damage to the said vessel, which is hereto annexed and marked F, and which amounted to the sum of rs. 70,202.3; that on the 28th *idem* this appearer, John McManus, re-
91 ceived instructions to put the said vessel up for sale at public auction as she stood, and after due advertisement she was put up for auction sale on the 10th day of May, 1886, by Messrs. McKenzie, Lyall & Co., auctioneers of Calcutta, but was not sold, the highest bid made being rs. 5,000—; that the 552 damaged bales of jute cuttings so landed from said vessel as aforesaid were stored in the godowns of Messrs. Ralli Brothers, where they still remain, all the efforts having been made by the said John McManus to obtain freight to carry them to their original destination having hitherto failed; that on the said 20th day of February last this appearer, John McManus, appeared before the undersigned, notary public, and caused his protest to be duly noted, reserving liberty to extend the same.

And these appearers do protest and I, the said notary, do also protest against the aforesaid fire, grounding, refusal to allow the discharge of cargo, and all other accidents and occurrences and all loss or damage occasioned thereby.

We, John McManus, Harris Christopher Pickles, and John James Hodge, do solemnly and sincerely declare that the foregoing statement is correct and contains a true account of the facts and circumstances.

J. McMANUS.
H. C. PICKLES.
JOHN JAMES HODGE.

Thus sworn and protested in due form of law at Calcutta aforesaid the day and year first above written.

HENRY A. ADKIN,
92 *Notary Public, Calcutta.*

The following consent made in the district court was thereupon read:

United States District Court, Southern District of New York.

STEPHEN A. RALLI *et al.*
vs.
HOWARD D. TROOP *et al.* } Consent.

It is consented that the original adjustment of general average (Respondents' Exhibit G), on account of its size and shape, with the vouchers thereto, need not be printed in the apostles; that the originals or copies may be used by either party on the hearing of this cause. It is also agreed that the appellants need not print the printed exhibits referred to in the testimony of the witness Farr, the same being a volume of statutes. The original thereof may be

cited by either party and submitted on the hearing to the circuit judge.

The rules concerning the management of vessels and uses of fires and lights testified to by the witnesses Farr and Petty as in force in Calcutta from August 19, 1879, to July 10, 1886, have the following caption:

93 "*Port Rules (for the Port of Calcutta, within the Jurisdiction of the Port Commissioners).*

"Under the provisions of act XII of 1875 the lieutenant governor is pleased to sanction the following revised rules to be observed within the port of Calcutta." * * * Rule 30 thereof was as follows:

"30. No person shall smoke or use naked lights of any description in the hold or between decks or any vessel lying in port. Closed lanterns, secured by lock and key and in charge of an officer of the vessel, shall alone be taken between decks or into the hold."

Respondents' counsel specially object to proof of any rules or by-laws that may have been adopted subsequent to February 18, 1886, the date mentioned in the libel, but, without waiving said objection and insisting thereon, they admit that it was testified that revised rules went into effect on July 10, 1886, and that rule 42 of said revision is as follows:

"42. No person shall smoke or use naked lights of any description in the hold or between decks of any vessel lying in the port. Closed lanterns burning candles or vegetable-oil lights, secured by lock and key and in charge of an officer of the vessel, shall alone be taken between decks or into the hold."

The foregoing stipulation may be printed as a part of the record on appeal herein.

Dated May 6, 1889.

WING, SHOUDY & PUTNAM,
Proctors for Respondents.

94 SIDNEY CHUBB,
Proctor for Libellants.

Thereafter and on the 12th day of November, 1889, the circuit court made and filed its findings of fact and conclusions of law herein.

Thereafter and on the 25th day of June the proctor for the libellants duly filed in the office of the clerk of the said circuit court and served upon the proctors for the respondents the following exceptions to the rulings of the said circuit court:

First Exception.

They except to the finding contained in the first finding of fact signed by the circuit judge, that the libellants constituted the firm of Ralli Brothers, of New York and Calcutta, upon the ground that it is contrary to uncontradicted evidence, and that it was shown by

the pleadings and by uncontradicted evidence and is material that the libellants are the firm of Ralli Brothers, merchants, of London, England, having branch houses in New York and in Calcutta.

Second Exception.

They except to the finding contained in the sixth finding of fact signed by the circuit judge, that neither the master nor the officers had any notice of the regulation of the port of Calcutta described in said sixth finding of fact, upon the ground that the court, against the objection and remonstrance of these appellants, thereby
95 found a material fact which is not supported by any evidence whatever.

Third Exception.

They except to the finding contained in the tenth finding of fact signed by the circuit judge, that an average bond was then executed by the libellants, by which it was provided that the general average should be adjusted by Jacob R. Telfair, etc., upon the ground that it was shown by uncontradicted evidence and is material that it was provided by said bond that "the losses and expenses aforesaid or so much thereof as, upon an adjustment of the same to be stated by Jacob R. Telfair according to the laws and usages of this port in similar cases, may be shown to be a charge upon the said cargo or upon any of the cargo of said vessel which may be received by us should be paid by us respectively," etc.

Fourth Exception.

They except to the finding contained in the eleventh finding of fact signed by the circuit judge, that the libellants presented to the said Telfair various claims for their disbursements which were allowed as general average, upon the ground that it was shown by uncontradicted evidence and is material that the said Telfair procured from the said libellants the figures concerning their expenses and used them in making up their said adjustment.

96 *Fifth Exception.*

They except to the refusal of the circuit judge to find, upon request, that the respondents are part owners of the British bark J. W. Parker, of St. John, N. B., Canada, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Sixth Exception.

They except to the refusal of the said circuit judge to find, upon their request, that all of the parties to the action are subjects of the Queen of the United Kingdom of Great Britain and Ireland upon the ground that the said fact is shown by uncontradicted evidence and is material to the determination of the cause.

Seventh Exception.

They except to the refusal of the circuit judge to find, upon their request, that the charter-party of the bark J. W. Parker, of which Exhibit 1 (apostles, 168) is a copy, was executed in London, England, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Eighth Exception.

They except to the refusal of the circuit judge to find, upon their request, that certain officials of the Government of Calcutta, known as the commissioners for making improvements in the port of Calcutta and the conservator of the port and his deputy, took
97 exclusive charge of the said vessel and cargo, and that on the return on board of the master, John McManus, who had been ashore to engage a tug to take the vessel to sea, found the said authorities in charge, and they refused to allow him to interfere in any way with the management of the said vessel or her cargo or with the proceedings had by their orders for the extinguishing of the said fire, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Ninth Exception.

They except to the refusal of the circuit judge to find, upon their request, that at 6 p. m. on Thursday, February 18th, 1886, the said master, McManus, proposed and wanted to open the fore hatch to play water on the fire and commence to discharge the cargo out of the main and after hatches, but was prevented from so doing by order of W. Duff Bruce, executive of the said commissioners for making improvements in the port of Calcutta, although, in the judgment of the said master, McManus, the said discharging was prudent and feasible and would, had it been permitted, have saved a large portion of the cargo, exceeding 5,000 bales, dry, and the ship would not have been injured, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Tenth Exception.

98 They except to the refusal of the circuit judge to find, upon their request, that the said port authorities put the vessel aground against the objection and protest of her said master upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Eleventh Exception.

They except to the refusal of the circuit court judge to find, upon their request, that the said proceedings for extinguishing the said fire and discharging the said cargo proposed to be taken by said

master were those best calculated to insure the ultimate safety of the vessel and cargo, with the smallest amount of loss or damage, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Twelfth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the said master was prevented from taking the proceedings proposed by him for extinguishing the fire by the said action of the port authorities in taking from him the charge of his said vessel upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Thirteenth Exception.

99 They except to the refusal of the circuit judge to find, upon their request, that by a statute of the Imperial Parliament of Great Britain and Ireland, enacted in 1861, cited as the Indian council act, 1861, 24 & 25 Victoria, chapter 67, power was conferred upon the governor general of India in council to make laws and regulations for the government of India, with authority to constitute in the several provinces and divisions of India, of which Bengal is one, a legislative council for each of such provinces and divisions. By proclamation, duly issued by the governor general in council of June 17th, 1862, under the authority of the said Indian council's act, 1861, the Bengal legislative council was established, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Fourteenth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the Bengal legislative council, under the authority of an enactment of the said governor general of India in council known as the Indian ports act, being act XII of 1875, duly enacted and promulgated certain rules and regulations concerning the management of the vessels and the conduct of their masters and crews, and touching the moorings and wharfings of vessels and the use of lights and fires on board said vessels while in the port of Calcutta, on the ground that this said fact was shown by uncontradicted evidence and is material to the determination of the cause.

100 *Fifteenth Exception.*

They except to the refusal of the circuit judge to find, upon their request, that a printed copy of the said rules, marked Exhibit F, is annexed to the deposition of George Charles Farr, taken in the district court. The *captain* of said rules as in force from August 19, 1879, to July 19, 1886, — as follows:

"Port rules (for the port of Calcutta, within the jurisdiction of the

port commissioners). Under the provisions of act XII of 1875 the lieutenant governor is pleased to sanction the following rules to be observed within the port of Calcutta."

Rule 30. "No person shall make or use naked lights of any description in the hold or between decks of any vessel lying in port. Closed lanterns, secured with lock and key and in charge of an officer of the vessel, shall alone be taken between decks and into the hold," upon the ground that the said fact was shown by uncontradicted evidence and *are* material to the determination of the cause.

Sixteenth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the said rules and regulations so promulgated have the force of law, in that all persons within the limits of the port or places mentioned therein are conclusively presumed to know them.

No actual notice of their existence need be given to any per-
101 son before they can be found guilty thereof, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Seventeenth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the officers of the said bark J. W. Parker were negligent in sending the said seaman Edwards into the locker to stow the said chain upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Eighteenth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the sending of the said seaman Edwards to stow the said chain cables with the aforesaid lamp was a violation of law, to wit, a breach of the regulation set out in the sixth finding of fact made by the said circuit judge, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Nineteenth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the respondents' negligence was the cause of the said disaster to the said bark and her cargo upon the ground that the said fact was shown by uncontradicted evidence and is ma-
102 terial to the determination of the cause.

Twentieth Exception.

They except to the refusal of the circuit judge to find, upon their request, that the respondents' negligence was the cause of the said disaster to the said bark and her cargo upon the ground that the

said fact is material to the determination of the cause, and that there is no evidence to rebut the presumption arising from a breach of the regulations set out in the sixth finding of fact by the respondents' agents and servants and the other facts set out in the said sixth finding of fact.

Twenty-first Exception.

They except to the ruling of the circuit judge excluding the copy of the testimony given by certain witnesses *that* the court of inquiry held at Calcutta, a copy of which was annexed to the deposition of George Charles Farr, upon the ground that the said ruling was erroneous and prejudicial to the libellants.

And forasmuch as none of the libellants' said exceptions so offered and made to the said rulings of his honor the circuit judge who presided at the trial of said cause, and none of the evidence upon which the said rulings, findings, exceptions, and conclusions were based do appear on the record of the said trial, therefore, on the prayer of the said libellants, by their counsel, the said circuit judge hath to this bill of exceptions put his hand and seal according to the statute in such case made and provided, and hath ordered that the same be filed *nunc pro tunc* as of the date of filing the said findings of fact, &c., to wit, on the 12th day of November, A. D. 1889.

WM. J. WALLACE,
Circuit Judge.

Endorsed: United States circuit court, southern district of New York. Stephen A. Ralli *et al. vs.* Howard D. Troop *et al.* Bill of exceptions. Sidney Chubb, proctor for libellants, No. 50 Wall street, New York, N. Y. U. S. circuit court. Filed Aug. 26, 1890, *nunc pro tunc* as of Nov. 12, 1889. John A. Shields, clerk.

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

STEPHEN AUGUSTUS RALLI, ALEXANDER ANTHONY Vlasto, and Lucas Eustratios Ralli, Libellants and Appellants,

vs.

HOWARD D. TROOP and —— TROOP, Composing the Firm of Troop and Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Part Owners of the British Bark "J. W. Parker."

Bond for Damages and Costs.

Know all men by these presents that we, Angus J. Macdonald and Charles Myers, are held and firmly bound unto the abovenamed respondents in the sum of five hundred dollars, to be paid to the said respondents; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the thirtieth day of January, in the year of our Lord one thousand eight hundred and ninety.

Whereas the above-named libellants and appellants have prosecuted their appeal to the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their said appeal and plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. J. MACDONALD. [L. S.]
CHAS. MYERS. [L. S.]

Sealed and delivered and taken and acknowledged this 30 day of January, 1890, before me—

W. D. DESPARD,
[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county.

105 [Endorsed:] U. S. circuit court, southern district of New York. Stephen A. Ralli *et al.*, appellants, *vs.* Howard D. Troop *et al.*, respondents. Bond for damages, &c., costs on —. Sidney Chubb, proctor for appellants, 50 Wall St., New York. U. S. circuit court. Filed Feb. 5, 1890. John A. Shields, clerk.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

A. J. Macdonald and Charles Myers, being duly sworn, do each depose and say for himself that he is a householder within this State, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

A. J. MACDONALD,
69 Wall St., N. Y.
CHAS. MYERS,
71 Park Ave., N. Y.

Sworn to this thirtieth day of January, A. D. 1890, before me—

W. D. DESPARD,
[L. S.] *Notary Public, Kings County.*

Certificate filed in New York county.

I approve the within bond.

E. HENRY LACOMBE,
Circuit Judge.

106 United States Supreme Court.

STEPHEN AUGUSTUS RALLI, ALEXANDER ANTHONY VLASTO, and LUCAS EUSTRATIOS RALLI, Libellants and Appellants,
vs.
HOWARD D. TROOP and JAMES TROOP, Composing the Firm of Troop & Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, Lately Part Owners of the British Bark "J. W. Parker," Respondents. } Libellants' Appeal.

To the honorable the Supreme Court of the United States:

The appeal of the above-named libellants and appellants respectfully shows—

That on or about the 6th day of May, 1887, these libellants and appellants exhibited their libel, with a clause of foreign attachment, in the district court of the United States for the southern district of New York against Howard D. Troop and James Troop, co-
partners composing the firm of Troop & Son, ship-owners, of
107 St. John, N. B. (James being fictitious), and John Doe and Richard Doe, lately owners of the British bark "J. W. Parker," of St. John, N. B., praying, among other things, that the respondents be condemned to pay the libellants' claim in the sum of $22,000 for the value of the undelivered balance of the libellants' shipment of jute butts laden on board the respondents' ship "J. W. Parker" at Calcutta, with interest and costs, as will more fully appear by reference to said libel; that process of foreign attachment was duly issued as prayed for, and such proceedings were had thereupon that certain of the respondents, part owners of the said bark, duly appeared in said action, and on the 31st day of May, 1887, filed a bond for the value of their interests attached under said process in the sum of $15,000, with a stipulation for libellants' costs, and thereafter the respondents above named filed their verified answer herein, and on the same day they paid into court the sum of $7,420.48, as by reference to said answer will more fully appear.

That thereafter the libellants moved the court upon all the
108 papers and proceeding in the case for leave to withdraw the said sum so deposited in the registry; that the said motion was heard on the 28th day of June, 1887, by the district judge and denied, no order being entered thereon.

That thereafter and on the 3rd day of January, 1889, the said cause came on to be heard before the Hon. Addison Brown, district judge, upon the proofs and depositions of the respective parties, and the said district judge, having advised thereon, did, on or about the 4th day of March, 1889, file his opinion in writing, ordering a decree to be entered as therein directed.

That thereafter and on the 4th day of April, 1889, the said district court made a final decree herein, whereby, among other things, it was adjudged that the libellants and respondents were respect-

ively entitled to general average contributions for the water damage and losses incurred in and about the bark "J. W. Parker;" and it was further adjudged that the said libellants recover the said sum paid into court, with the interest accrued thereon, amounting together to the sum of $7,619.98, and also recover of the respondents the further sum of $286.86.

109 That thereafter these libellants duly appealed from said final decree to the next circuit court of the United States for the southern district of New York, and the said cause was thereupon removed into the said circuit court and was there tried anew, and such proceedings were had in the said circuit court that thereafter and on the 10 day of December, 1889, the said circuit court made its final decree in the said cause, whereby it was decreed that the respondents have a lien for a contribution in general average upon the proceeds of the libellants' cargo sold by the master of the said bark "J. W. Parker" at Calcutta; that the funds in the registry of the court be paid to the libellants, and that the respondents recover of the libellants $63.20, their taxed costs of appeal in said circuit court, as more fully appears by reference to the said final decree of the said circuit court.

And these libellants and appellants are advised and insist that the said final decree is erroneous in part, inasmuch as the said libellants were and are entitled to be decreed the full amount

110 of the said claim, with interest and costs, and that the said respondents are not entitled to any contribution on general average as adjudged by the said decree, and that the said decree ought to be reversed.

Wherefore the libellants appeal from the said decree of the said circuit court to the Supreme Court of the United States, and respectfully pray that the pleadings and findings of fact and conclusions of law made by the circuit court therein and the bill of exceptions and final judgment and decree and the proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court in so much thereof as adjudges the respondents to be entitled to a lien for a contribution in general average upon the said proceeds of the libellants' cargo may be reversed and a decree made in favor of these libellants for the balance of their claim not decreed to be paid out of the registry of the court, with interest and costs, and for such other and further and different decree as to the said Supreme Court shall seem just.

111 SIDNEY CHUBB,
Proctor for Appellants, No. 50 Wall Street, New York, N. Y.

The foregoing appeal is hereby allowed.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: United States Supreme Court. Stephen A. Ralli *et al.*, appellants, *vs.* Howard D. Troop *et al.*, respondents. Appeal. Sidney Chubb, proctor for appellants, No. 50 Wall street, New York, N. Y. Service admitted Feb. 5th, 1890. Wing, Shoudy & Putnam, proctors for resp'ts. U. S. circuit court. Filed Feb. 5, 1890. John A. Shields, clerk.

112 UNITED STATES OF AMERICA, *ss.:*

By the Hon. E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Howard D. Troop and —— Troop, composing the firm of Troop & Son, of St. John, N. B., and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, lately part owners of the British bark "J. W. Parker," of St. John, N. B., respondents, Greeting:

Whereas Stephen A. Ralli, Alexander Anthony Vlasto, and Lucas Eustratios Ralli, surviving partners of the firm of Ralli Bros., have lately appealed to the Supreme Court of the United States from a final decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the above-named respondents, and have filed the security required by law, you are, therefore, hereby cited and admonished to be and

113 appear before the said the Supreme Court of the United States, at the city of Washington, on the second Monday of October, A. D. 1890, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, on the 31st day of January, in the year of your Lord one thousand eight hundred and ninety, and of the Independence of the United States one hundred and fourteen.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: United States Supreme Court. Stephen A. Ralli *et al.*, appellants, *vs.* Howard D. Troop *et al.*, respondents. Citation on appeal. Sidney Chubb, proctor for appellant-, 50 Wall St., New York, N. Y. U. S. circuit court. Filed Feb. 5, 1890. John A. Shields, clerk. Service admitted. Feb'y 5th, 1890. Wing, Shoudy & Putnam, proctors for resp'ts.

114 UNITED STATES OF AMERICA, } *ss.:*
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 113, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Stephen

Augustus Ralli, Alexander Anthony Vlasto, and Lucas Eustratios Ralli, libellants and appellants, against Howard D. Troop and James Troop, composing the firm of Troop & Son, of St. John, and Gustavus Vaughan, James Albert Delap, John W. Parker, and Mark Shaw, lately part owners of the British bark "J. W. Parker," respondents, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this sixteenth day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,313. S. New York C. C. U. S. No. 299. Stephen A. Ralli, Alexander Anthony Vlasto, and Lucas Eustratios Ralli, surviving partners of the firm of Ralli Brothers, appellants, *vs.* Howard D. Troop and —— Troop, composing the firm of Troop & Son; Gustavus Vaughan, *et al.* Filed October 18, 1890.

Office Supreme Court U. S.
FILED.
MAR 12 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 299.

STEPHEN A. RALLI ET AL.,
Appellants,

vs.

HOWARD D. TROOP ET AL.,
Respondents.

BRIEF FOR APPELLANTS.

SIDNEY CHUBB,
Of Counsel for Appellants.

Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1893.

STEPHEN A. RALLI *et al.*,
Appellants,

vs.

HOWARD D. TROOP *et al.*,
Respondents.

No. 299.

BRIEF FOR APPELLANTS.

Statement.

The appellants filed their libel in the District Court of the United States for the Southern District of New York, alleging that pursuant to a charter party they had laden at the port of Calcutta a cargo of 7,592 bales of jute and 62 bags of saltpetre upon the British bark *J. W. Parker*, owned by the respondents and bound for Boston, Mass.; that a fire broke out on said bark while in Calcutta, by reason of which both vessel and cargo were injured by fire and water and the voyage was abandoned and broken up. That her master, McManus, sold all except 552 bales of said jute, at public auction at Calcutta and remitted the proceeds thereof to the respondents, and they demanded judgment for the value of undelivered cargo, amounting to $22,000.

The respondents herein appeared and filed their answer, in which they admitted that they were part owners in said bark and that her master sold the said cargo, and they held the proceeds thereof, less the legal charges and expenses. They

also alleged, *inter alia*, that an adjustment of general average had been made up by one Jacob R. Telfair, by which it appeared among other things that the proceeds of the sales of cargo at auction, made by the master at Calcutta, amounted to $20,752.83, and that the balance due the cargo interest from the respondents after deducting the general average charges of saving was $7,420.48, which adjustment they alleged they were willing to abide by, and have deposited the said balance of $7,420 in the.48 registry of the Court, to abide the event of this action; and they further alleged (fol. 11):

> "If the question is, however, now to be reopened, these respondents say that the said bark, *J. W. Parker*, was lost by the *vice propre* of said jute having been bailed in a green condition, and of known dangerous tendencies for shipment, and that all the loss and damage sustained herein was attributable to the act of the charterers in negligent shipment of such bales of jute in their dangerous condition, and that libellants are not entitled to recover any sum whatever on this action, as the loss to these respondents by said casualty amounts to $25,000 and upwards."

By Admiralty Rule 52, new matter set up in the answer is considered as denied by the libellants and no replication general or special is allowed.

Prior to filing their answer the respondents paid into Court the sum of $7,420.48 as "a tender of the amount due the libellants" (Transcript, fol. 54), and gave a stipulation for value of property attached in $15,000.

All the evidence in the case was taken by deposition *de bene esse* or under a commission, except that of Richard O. Lovatt, the average adjuster, Lawrence Phillips, the libellants' manager in New York, Baxter and Martin, who were examined before the District Judge.

Upon the trial and in the Circuit Court the libellants contended that they were entitled to a decree for $20,752.83, the amount of the cargo sales, together with interest and costs, and that no deduction therefrom form the general average contribution claimed by the respondents could be allowed by the Court.

The adjustment of general average set up by the respondents' answer and the vouchers from which its figures were taken

were proved upon the trial. As it is a physical impossibility to print the adjustment with the type and size of page required by the Court Rules, and as there is no dispute as to its details being correct if the facts made out the case of general average claimed by the respondents, it was provided by stipulation (printed at p. 74 of the Transcript of Record), that the printing thereof should be dispensed with, and that either party might use the original or copies on the appeal. The stipulation also provided that the exhibits annexed to the deposition of the lawyer Farr need not be again printed, that the original might be used by either party upon appeal, and the most material part thereof was set out in *ipsissimis verbis* in the stipulation.

The District Court, after hearing the proofs and arguments, sustained the respondents' claim that the facts made out a case of general average, and decreed the libellants only the sum of $7,828.95, and clerk's fees, substantially the amount paid into Court by the respondents, with interest thereon.

From this decree the libellants appealed to the United States Circuit Court for the Southern District of New York, held by Wallace, Circuit Judge, where the decree appealed from was affirmed with costs to the respondents, and the libellants having received the amount in the registry, have appealed to this Court for the balance of their claim, from the final decree of the Circuit Court, and have duly filed a transcript of the record containing *inter alia* a bill of exceptions signed by the said Circuit Judge.

The errors made by the Circuit Court and complained of on this appeal are of three kinds:

First.—In that it declined, at appellants' request, to find certain finding of material facts proved by uncontradicted evidence, and in that it made certain findings of material facts contrary to uncontradicted evidence (see pp. 9-16 of this Brief).

Second.—In that it excluded certain evidence offered by the libellants, consisting of a transcript of the evidence, proceedings and decision of the Marine Court held at Calcutta by lawful authority, to investigate the loss of the bark *J. W. Parker*, and the deposition of the witness Farr, offered to prove the said transcript and the authority of the said Marine Court.

See pp. 17-19 of this Brief.

THIRD.—In that the said Circuit Court declined to hold that the case was not one of general average upon the following grounds:

I.—Because the negligence of the respondents' servants, in sending a common seaman with an unlocked lantern to work under deck among jute bales, was the cause of the fire and its attendant loss, and was, therefore, a bar to the claim.

II.—Because the alleged general average sacrifice was not ordered by the master alone, or by some qualified person acting in his stead and charged with the protection of the same interests and no others, for the best interests of the entire adventure, but was ordered by a person who (*a*) was not qualified to act as master of a merchant vessel; (*b*) who acted not as a substitute for the master and therefore subordinate to him when present, but as a superior to the master under a claim of paramount authority and independent of him; (*c*) who ordered a sacrifice which the master did not think necessary or expedient, and protested against in vain, and (*d*) who was charged with the preservation of an interest other than those of ship, freight and cargo, *i. e.*, the safety of the port of Calcutta and its shipping.

The principal facts of the case are set out in the following findings of fact signed by the Circuit Judge and printed at pages 20–23 of the Transcript of Record. To these should be added, we contend, a few corrections and additions as set forth in Points I. and II. hereof.

Findings of Fact.

1. Libellants, who constituted the firm of Ralli Brothers, of New York and Calcutta, on October, 25, 1885, chartered the British bark *J. W. Parker* to load jute and saltpetre for a voyage from Calcutta to New York. Exhibit No. 1, in the Apostles (p. 168), is a copy of this charter.

2. The vessel accordingly proceeded to Calcutta, and while moored in the river there, was fully laden by libellants with 7,592 bales of jute butts and 1,062 bags of saltpetre, for which the master signed the usual bills of lading, undertaking to deliver said cargo at Boston.

3. On the morning of February 18, 1886, a port pilot came on board and took charge of unmooring, preparatory to taking the bark to sea. All the hatches had been tightly covered the night before. As the anchor chain was hove in, it was necessary for a man to go into the chain locker forward to stow the chain. To reach the locker the fore hatch had to be opened; thence one could go through a narrow passage about three feet wide and three feet high between the jutes bales to the chain locker, which was about eight feet forward of the hatch. Ernest Edwards, an able seaman, who had been several months on the bark, took a globe lantern which did not have a lock, but in which the lamp was screwed into the body of the lantern, and, by the mate's orders, went through the fore hatch into the chain locker to stow the chain. This was between nine and ten o'clock A. M. A few minutes afterwards he was heard to scream—at the same time smoke was seen coming out of the ventilators. The men who tried to rescue him were driven back by the smoke in the fore hatch. Edwards was suffocated. His body was afterwards found in the chain locker.

4. Thereupon the second officer of the bark caused an alarm to be sounded by ringing the vessel's bell, and from sixty to seventy men from the crews of the neighboring vessels came to his assistance. These men brought buckets with them. Water was poured from the buckets into the fore hold. A force pump on the bark, and another force pump brought from a ship near by were both playing large streams of water down the hold. After half an hour of this work the hatches were covered with wet sails and tarpaulins, but the pumps were kept playing into the chain lockers.

5. Between eleven and twelve o'clock, and while both force pumps were still being steadily worked, the port authorities came with fire engines and took direction of the vessel, and on the return on board of the master he found the port authorities in charge. The port fire engines, charged with fire extinguishing chemicals, were placed through holes cut in the deck. During the night the fire engines continued pumping in steam, and in the morning the fore hatchway was opened and six hoses were

played on the fire in the fore hold, but as this seemed to increase the fire, the hatches were put on again. The port authorities then moved the ship and put her aground. In the forenoon the captain removed 552 bales of jute from the bark and desired to remove more, but the port authorities objected and forbade it because of the danger of increasing the fire. During that day the port authorities pumped water in the ship, and during the night and following morning the fire was extinguished by the vessel being scuttled. The master believed that it was prudent and feasible to discharge more cargo at the time he was prevented from doing so by the port authorities. The measures taken by the mate before the port authorities took charge of the ship, and those subsequently taken by the port authorities were the best available to extinguish the fire and to save greater loss upon the cargo.

6. That the fire was communicated to the said cargo by the lamp carried by the seaman Edwards while on his errand to the chain locker, but whether the occurrence happened by the accidental breaking of the glass of the lantern, or whether by his act in removing the lamp from the lantern, or whether by the lamp becoming unscrewed, or how the occurrence took place, cannot be ascertained. Jute, or jute butts in bales, is very inflammable cargo, and a lamp or lantern in which the flame is exposed, cannot safely or prudently be carried through such a narrow passage as Edwards had to pass. At the time there was in force a regulation of the port of Calcutta, which has been duly promulgated by the proper authorities, as follows: "Rule 30. No person shall smoke or use naked lights of any description in the hold or between deck of any vessel lying in port. Closed lanterns, secured by lock and key, and in charge of an officer of the vessel, shall alone be taken between decks and into the hold." Neither the master nor the officers of the bark had any notice of this regulation.

7. The jute had been packed in the bark's hold as closely as the compressed bales could be forced together by screws. The effect of the water poured on the jute was to expand it, and spring up the decks, break the hatch combings, and draw out the timbers. The raising of the decks and starting of the beams was observed early in the morning of the day after the fire.

The swelling continued even after a portion of the cargo was removed. The *J. W. Parker* became a wreck not worth repairing.

8. The master, when the port authorities allowed him to resume charge of the vessel, acting for the best interests of all concerned, proceeded to save the residue of the cargo that remained in the vessel. By the outlay of about $8,000 for men and lighters to get the damaged jute out of the bark, and for repacking it for sale, he was able to land same in godowns or warehouses. He consulted the firm of Turner, Morrison & Co., who were agents of the underwriters on cargo, and followed their directions as to landing the cargo before sale. Surveys were then had, and the cargo was condemned and sold as unfit to go forward, and realized on such sale $20,752.83. The ship was also condemned as unseaworthy, and was sold for 8,000 rupees equal to about $2,716.24.

That the said master, second officer, and a seaman of said bark duly made and extended, under oath, a protest against the said fire and against the said actions of the said port authorities, in depriving the master of his said command and in refusing to permit of the discharge of cargo after it had been commenced, and in causing the said vessel to be stranded or scuttled and in allowing the tide water to raise over her deck; that the said protest is printed at page 161 *et seq.*, of the apostles herein.

9. On March 8, 1886, the owners of the bark *J. W. Parker*, offered to turn over all the cargo to the libellants if they would sign an average bond. This offer was made in New York and was declined.

10. The 552 sound bales of jute were transhipped by the captain and were delivered to libellants' agents at Boston. An average bond was then executed by libellants, by which it was provided that the general average should be adjusted by Jacob R. Telfair, an average adjuster at the port of New York. This was in pursuance of the following clause of the charter-party:

> "All questions of average to be settled in accordance "with York Antwerp rules and the established usages and "laws of the port of destination, to be stated by average "adjusters appointed by charterers' agents and approved "by owners."

11. On December 7, 1886, a general average adjustment was made up in accordance with the York-Antwerp rules and the usages of said port. The libellants presented to their adjuster various claims for their disbursements, which were allowed as general average, as were also certain disbursements by the underwriters upon the cargo.

12. By the adjustment, as made up aforesaid, it was found and stated, after allowing the general average due to the vessel, that the libellants, as owners of the jute, were entitled to an average contribution of $5,335, and to the further sum of $1,283 for loss of their saltpetre, together with the sum of $290.51 for advances and profits upon their charter-party, and $227.76 for certain disbursements of Ralli Bros., incurred in connection with said average adjustment. The owners of the vessel were willing to abide by this adjustment, but libellants or their underwriters declined to accept the same.

13. Some months afterwards this action was begun; the respondents thereupon paid into Court the full amount due to libellants, and to their underwriters by said adjustment, and gave security for the residue of libellants' demand.

14. The District Court having made a decree sustaining said average adjustment, but condemning respondents in interest upon the sum of $5,335 as the contribution due for the loss of the jute, also in the sum of $77.89 the amount of the clerk fees on respondents' deposit, the respondents thereupon paid into that Court the further sum of $286.86, making the full amount of the decree of the District Court.

Conclusions of Law.

1. The extinguishing of the fire at Calcutta was a general average act, and the water damage so incurred was a general average sacrifice, for which contribution is due from all interests thereby benefited.

2. An average bond having been given by the libellants, and the loss being adjudged a proper subject of general average, and no errors being shown in the adjustment, the libellants are

entitled to a decree for the balance stated by the adjustment as aforesaid and for no more.

3. The respondents are entitled to their costs in this Court.

Dated November 9, 1889.

WILLIAM J. WALLACE,
Circuit Judge.

Point I.

THE FINDINGS MADE BY THE CIRCUIT COURT ARE DEFECTIVE AND ERRONEOUS IN THE PARTICULARS SET FORTH IN THE FOLLOWING EXCEPTIONS TAKEN BY THE APPELLANTS AND PRINTED AT PAGES 48 TO 53 OF THE RECORD.

We concede that findings of fact made by the Circuit Court upon *contradictory* evidence are conclusive here, and we are not attempting to review here any such decisions of the Circuit Court. On the contrary, both sides agreed in the Court below that "substantially there was little dispute below on the facts. No new proofs are before this Court."

Respondents' Brief in Circuit Court, p. 1.

Our object is to supplement the rather meagre statement of facts made by the Circuit Court by other facts proved by uncontradicted evidence, which, in view of the novelty and importance of the case, seem to us material, and to make a few corrections both upon uncontradicted evidence, which we think we are entitled to do under the decision of this Court in the case of the *City of New York*, 147 U. S., 77.

> "If the Court below *neglects or refuses* to make a find-
> "ing one way or the other as to the existence of a mate-
> "rial fact, which has been established by uncontradicted
> "evidence, or if it finds such a fact when not supported
> "by any evidence whatever, and an exception be taken,
> "the question may be brought up for review in that
> "particular. In the one case the refusal to find would
> "be equivalent to finding that the fact was immaterial,

"and in the other that there was some evidence to prove
"what is found, when in truth there was none.
"Both of these are questions of law and proper subjects
"for review in an appellate court."

See also

The *Francis Wright*, 105 U. S., 387.
Sun Mutual Ins. Co. v. Ocean M. Ins. Co., 107 U. S., 485.
The *E. A. Packer*, 140 U. S., 360.

We therefore collate under each exception the folios of the Transcript of Record in support thereof.

First Exception.

They except to the finding, contained in the first finding of fact signed by the Circuit Judge, that the libellants constituted the firm of Ralli Brothers, of New York and Calcutta, upon the ground that it is contrary to uncontradicted evidence and that it was shown by the pleadings and by uncontradicted evidence, and is material, that the libellants are the firm of Ralli Brothers, merchants, of London, England, having branch houses in New York and in Calcutta.

Transcript of Record, fol. 1, not wholly denied at fol. 6 and fols. 4, 46, 47, 50, 58, 64, 68.

Second Exception.

They except to the finding, contained in the sixth finding of fact signed by the Circuit Judge, that neither the master nor the officers had any notice of the regulation of the port of Calcutta described in said sixth finding of fact, upon the ground that the Court, against the objection and remonstrance of these appellants thereby found a material fact which is not supported by any evidence whatever.

Transcript, fols., 70, 76.

Third Exception.

They except to the finding, contained in the tenth finding of fact signed by the Circuit Judge, that an average bond was

then executed by the libellants, by which it was provided that the general average should be adjusted by Jacob R. Telfair, &c., upon the ground that it was shown by uncontradicted evidence, and is material, that it was provided by said bond that "The losses and expenses aforesaid, or so much thereof as upon an adjustment of the same, to be stated by Jacob R. Telfair according to the laws and usages of this port in similar cases, may be shown to be a charge upon the said cargo or upon any of the cargo of said vessel which may be received by us, should be paid by us respectively, &c."

Transcript, fol. 57.

Fourth Exception.

They except to the finding, contained in the eleventh finding of fact, signed by the Circuit Judge, that the libellants presented to the said Telfair various claims for their disbursements which were allowed as general average, upon the ground that it was shown by uncontradicted evidence, and is material, that the said Telfair procured from the said libellants the figures concerning their expenses and used them in making up their said adjustment.

Transcript, fol. 59.

Fifth Exception.

They except to the refusal of the Circuit Judge to find upon request that the respondents are part owners of the British bark *J. W. Parker*, of St. John, N. B., Canada, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 5, 6, 24, 28, 55.

The bark is admitted to have a British register, and by the British Merchant Shipping Act, of which an Admiralty Court will take judicial notice without proof, none but British subjects can be part owners of a vessel with a British register.

The *Pawashick*, 2 Lowell, 142.

See also

The *Maggie Hammond*, 9 Wall., 452.

Sixth Exception.

They except to the refusal of the said Circuit Judge to find upon their request that all of the parties to the action are subjects of the Queen of the United Kingdom of Great Britain and Ireland, upon the ground that the said fact is shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 1, 4, 5, 6, 46, 47, 50, 58, 64, 68, 24, 28, 55.

Seventh Exception.

They except to the refusal of the Circuit Judge to find upon their request that the charter-party of the bark *J. W. Parker*, of which Exhibit 1 (Apostles, 168,) is a copy, was executed in London, England, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 1, 6, 50.

Eighth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that certain officials of the Government of Calcutta, known as the commissioners for making improvements in the port of Calcutta, and the conservator of the port and his deputy, took exclusive charge of the said vessel and cargo, and that on the return on board of the master, John McManus, who had been ashore to engage a tug to take the vessel to sea, found the said authorities in charge, and they refused to allow him to interfere in any way with the management of the said vessel or her cargo, or with the proceedings had by their orders for the extinguishing of the said fire, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 84, 85, 86, 87, 91, 76, 65, 62, 61.

Ninth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that at 6 P. M. on Thursday, February 18, 1886,

the said master, McManus, proposed and wanted to open the fore-hatch to play water on the fire and commence discharge the cargo out of the main and after hatches, but was prevented from so doing by order of W. Duff Bruce, executive of the said commissioners for making improvements in the port of Calcutta, although in the judgment of the said master, McManus, the said discharging was prudent and feasible, and would, had it been permitted, have saved a large portion of the cargo, exceeding 5,000 bales dry, and the ship would not have been injured, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 61, 62, 65, 77, 84, 86, 87, 91.

Tenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the said port authorities put the vessel aground against the objection and protest of her said master, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 61, 76, 85, 86, 91.

Eleventh Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the said proceedings for extinguishing the said fire and discharging the said cargo proposed to be taken by said master, were those best calculated to insure the ultimate safety of the vessel and cargo, with the smallest amount of loss or damage, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 61, 62, 65, 76, 84, 85, 86, 87, 91.

Twelfth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the said master was prevented from taking the proceedings proposed by him for extinguishing the fire by

the said action of the port authorities in taking from him the charge of his said vessel, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 61, 62, 65, 76, 84, 85, 86, 87, 91.

Thirteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that by a statute of the Imperial Parliament of Great Britain and Ireland, enacted in 1861, cited as the Indian Council Act, 1861, 24 and 25 Victoria, Chapter 67, power was conferred upon the Governor-General of India in council to make laws and regulations for the government of India, with authority to constitute in the several provinces and divisions of India, of which Bengal is one, a legislative council for each of such provinces and divisions. By proclamation duly issued by the Governor-General in council of June 17, 1862, under the authority of the said Indian Council's Act, 1861, the Bengal Legislative Council was established, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 69, 70, 72.

Fourteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the Bengal Legislative Council, under the authority of an enactment of the said Governor-General of India in council, known as the Indian Ports Act, being Act XII. of 1875, duly enacted and promulgated certain rules and regulations concerning the management of the vessels and the conduct of their masters and crews, and touching the moorings and wharfings of vessels, and the use of lights and fires on board said vessels while in the port of Calcutta, on the ground that this said fact was shown by uncontradicted evidence and is material to the termination of the cause.

Transcript, fols. 69, 70, 72.

Fifteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that a printed copy of the said rules, marked Ex-

hibit F, is annexed to the deposition of George Charles Farr, taken in the District Court. The caption of said rules as in force from August 19, 1879, to July 10, 1886, as follows:

> "Port Rules (for the Port of Calcutta within the juris-
> "diction of the Port Commissioners) under the provis-
> "ions of Act XII. of 1875, the Lieutenant Governor is
> "pleased to sanction the following rules to be observed
> "within the port of Calcutta." Rule 30: "No person
> "shall smoke or use naked lights of any description in
> "the hold or between decks of any vessel lying in port.
> "Closed lanterns, secured with lock and key and in
> "charge of an officer of the vessel, shall alone be taken
> "between decks and into the hold."

upon the ground that the said fact was shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 93, 69, 70, 71, 72.

Sixteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the said rules and regulations so promulgated have the force of law, in that all persons within the limits of the port or places mentioned therein are conclusively presumed to know them. No actual notice of their existence need be given to any person before they can be found guilty thereof, upon the ground that the said facts were shown by uncontradicted evidence and are material to the determination of the cause.

Transcript, fols. 69, 70.

Seventeenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the officers of the said bark *J. W. Parker* were negligent in sending the said seaman Edwards into the locker to stow the said chain, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 60, 61, 62, 64, 66, 67, 79, 82.

Eighteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the sending of the said seaman Edwards to stow the said chain cables with the aforesaid lamp was a violation of law, to wit, a breach of the regulation set out in the sixth finding of fact made by the said Circuit Judge, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Transcript, fols. 65, 66, 68, 69, 70, 79, 80, 82, 93.

Nineteenth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the respondent's negligence was the cause of the said disaster to the said bark and her cargo, upon the ground that the said fact was shown by uncontradicted evidence and is material to the determination of the cause.

Infra, pp. 17–24.

Twentieth Exception.

They except to the refusal of the Circuit Judge to find, upon their request, that the respondent's negligence was the cause of the said disaster to the said bark and her cargo, upon the ground that the said fact is material to the determination of the cause, and that there is no evidence to rebut the presumptions arising from a breach of the regulations set out in the sixth finding of fact by the respondent's agents and servants, and the other facts set out in the said sixth finding of fact.

Infra, pp. 17–24.

Twenty-first Exception.

They except to the ruling of the Circuit Judge excluding the copy of the testimony given by certain witnesses that the Court of Inquiry held at Calcutta, a copy of which was annexed to the deposition of George Charles Farr, upon the ground that the said ruling was erroneous and prejudicial to the libellants.

Infra, pp. 17–19.

Point II.

THE COURT ERRED IN EXCLUDING THE SWORN STATEMENTS OF ALEXANDER FORSYTH AND ERNEST FREDERICK SCHNEIDER, CONTAINED IN THE COPY OF THE PROCEEDINGS OF THE MARINE COURT, PROVED BY THE WITNESS FARR.

The effect of the proceedings of the Marine Court, together with the testimony of Farr as to its lawful constitution and authority, and the additional facts that the *J. W. Parker* was a British vessel in a British port, is two-fold. (1st.) The report of the Court is a judgment of a court of competent and exclusive jurisdiction, that a breach of the port rules had been committed on board the *J. W. Parker* by sending Edwards below with an unlocked lantern.

No objection was made to that part of the proceedings which consisted of the report (fol. 73), and it is therefore unnecessary to argue its admissibility in this Court.

(2d.) The proceedings contained certain testimony which was relevant to matters of fact argued below; in so far as these statements were those of the master and officers of the *J. W. Parker*, they were admitted by the Court below and there is no exception made to such admission and, therefore, no occasion to argue their admissibility in this Court.

To the exclusion of the testimony of Forsyth and Schneider there are exceptions of record which may be considered here.

As to Forsyth, as his testimony was also taken under our commission, his sworn statement is not of sufficient importance to require extended discussion in this Court.

Schneider's testimony, however, was relevant to two points made by the respondent in the Court below, and should, we submit, have been admitted on the Court's own view of the law, as the witness was paid and employed by the respondents.

The first point to which this statement was relevant was the argument made by the respondent (see opinion of District Judge, fol. 17), that the fire was the result of spontaneous combustion caused by the *vice propre* of the jute. As to this we submit the following answer:

Notwithstanding the appellees did not appeal from the decree of the District Court which by allowing the libellants something

in excess of the amount paid into Court as a tender, necessarily passed adversely upon their contentions that the cause of the fire was the *vice propre* of the jute, they argued this contention in the Circuit Court, and as they may attempt the same argument in this Court we may properly consider the question at this point.

There are several reasons why it cannot be claimed here that *spontaneous combustion* of the cargo was the origin of the fire.

First.—The contention having been set up in the pleadings and passed upon adversely by both District and Circuit Court, and the respondent having omitted to appeal from either decree, is bound by them and cannot now be heard to argue the point.

Second.—If there was any evidence adduced in support of the proposition that spontaneous combustion of jute is possible and of the contention that it happened in this case, the Circuit Court has failed to find that either was fact, and no exception to its failure so to find appearing upon the Record, the contention cannot be urged here.

Third.—If there was no finding of the Circuit Court upon the point the inferences necessarily drawn from the evidence contained in the Bill of Exceptions negative the contention, since it appears *inter alia*, that the seaman Edwards when first sent below returned saying that he could not see, but saying nothing about heat, smoke or flame, which could not have been the case had the cargo been on fire or even smouldering. Moreover, the lantern was found separated from its burner, nor is even a suggestion of spontaneous contention it made in the elaborate Calcutta protest. The theory of spontaneous combustion seems to have made its first appearance *after* the date of the payment of the money into Court as "a tender of the amount due libellants" (fol. 11), and the subsequent verification of the libel where the tender is attempted to be transformed into a conditional deposit and held *in terrorem* over the heads of the libellants to induce them to accept the adjustment.

Fourth.—The Circuit Court has made a finding that the fire was caused by the lantern taken in by the seaman Edwards, and the finding is not excepted to.

FIFTH.--The final decree below *adjudges* the case one of general average, which is necessarily an adverse adjudication upon the respondents' claim "that all the loss and damage sustained "herein was attributable to the act of the charterers in neg- "ligent shipment of such bales of jute in their dangerous con- "dition, and that libellants are not entitled to recover any sum "whatever in this action, as the loss to these respondents by said "casualty amounts to $25,000 and upwards," and the respondents not having appealed from such adjudication, are concluded by it.

The second point to which Schneider's testimony is relevant is the respondent's contention that the port authorities must be held to have connived at or sanctioned the violation of the port rules, because, being on board as pilot, he must be presumed to have seen the lantern taken by Edwards and by not forbidding, to have acquiesced in its use. Of course, proof that Schneider was in the cabin writing a letter at the time disposes of this contention, and renders unnecessary all speculation as to the powers of port pilots to dispense with statutory precautions, &c.

Point III.

THE RESPONDENTS' NEGLIGENCE CAUSED THE DISASTER AND THEREFORE BARRED THEIR CLAIM FOR A GENERAL AVERAGE CONTRIBUTION.

It was not disputed as a matter of law in the courts below "that where the ship's negligence has made the sacrifice "necessary she cannot recover a general average contribution "from the cargo."

Opinion of the District Judge, Record, fol. 15.

And the authorities are uniform to this effect.

The Ontario, 37 Fed Rep., 222.
Gregory *v.* Orrall, 8 Fed. Rep., 287.
Prehn *v.* Bailey, 6 Prob. Div., 127, 133.
Robinson *v.* Price, 2 Q. B. D., 91.
Lowndes on Average, 4th Ed., 28.
Crump on Insurance, p. 139.
Gourlie on Insurance, pp. 15, 30, 48, 58, 59, 62, 66, 73.

It is expressly found by the Circuit Court as a fact (Record, fols. 39, 40), "that the fire was communicated to the said "cargo by the lamp carried by the seaman Edwards, while "on his errand to the chain locker; but whether the occurence "happened by the accidental breaking of the glass of the lan-"tern or whether by his act in removing the lamp from the "lantern or whether by the lamp becoming unscrewed, or how "the occurrence took place cannot be ascertained. Jute or "jute butts in bales is very inflammable cargo, and a lamp or "lantern in which the flame is exposed cannot safely or pru-"dently be carried through such a norrow passage as Edwards "had to pass."

The only question left for consideration upon this branch of the case is, therefore, whether the act of the servants of the respondents in sending the negro seamen Edwards into the hold with an unlocked lantern, amounted to negligence?

This question is either one of law or one of fact. If one of law, no exception is necessary for a review of the decision below—if it be one of fact such decision is reviewable here under our 18th, 19th and 20th exceptions (Record, fol. 101), since the evidence upon the point is uncontradicted.

The City of New York, 147 U. S., 77.

Sun Mutual Insurance Co. *vs.* Ocean Mutual Ins. Company, 107 U. S., 485.

Moreover, it is well settled in this Court that even in jury trials the question of negligence is one for the Court where the facts are not in dispute and are such that fair-minded men would not draw different conclusions from them.

Richmond & Danville R. R. Co. *v.* Powers, 149 U. S., 43.

Railroad Co. *v.* Stout, 17 Wall., 657.

Washington, &c., R. R. Co. *v.* McDade, 135 U. S., 554.

Delaware, &c., R. R. Co. *v.* Converse, 139 U. S., 469.

O'Neill *v.* Chicago, &c., R. R. Co., 1 McCrary, 505.

Shearman & Redfield on Negligence (4th Ed.), § 52, and cases cited.

Even if the port regulations in evidence had never existed, the mate's act, we submit, amounts to negligence. A cargo of jute cuttings is, on the findings and the evidence, more dangerous, because more inflammable, than a cargo of gunpowder, since the latter is always transported in closed packages, while the former is simply baled loose, leaving millions of loose ends protruding to catch fire, and the idea of sending a common seaman without an officer into a vessel's powder magazine, is condemned as dangerous by the universal practice of seamen of all countries; *a fortiori*, is it dangerous to send a common negro seaman alone to work in a confined space in a jute laden ship with a lantern of which the barner part is liable to drop out by accident or to be knocked out. Since the liability of the burner to fall out or be knocked out by accident or be taken out by a reckless or careless person not appreciating the danger of the act, and the necessary disastrous consequences of the naked flame thus coming near a bale, must, upon the findings, have been known to the officers in charge, their omission to take the simple precaution of fastening up the lantern to guard against such danger constitutes, within well-settled principles, negligence, and the inherent negligence of the act is in nowise affected by the fact that others have committed similar negligence and escaped without harm.

Negligence, in fact the only conclusion that can logically be drawn from the findings of fact made by the Circuit Court, irrespective of the appellants' exceptions.

The same result is also necessarily reached as a conclusion of law from a consideration of the effect of the "Port Rules."

This was a British vessel in a British port (and not a foreign vessel, as stated by the District Judge,); her master and crew, therefore, owed to the *lex loci* both temporary and permanent allegiance.

The Circuit Judge found as a fact that the "Port Rules," which had been duly promulgated by the proper authorities and were in force,

> "Forbade the carrying below of the lantern used by Edwards, and that the fire was communicated to the cargo by the lamp of said lantern" (6th finding, fol. 40).

It is true that he also found that neither the master nor the officers of the bark had any notice of this regulation, but this finding is wholly without evidence to sustain it, neither the

master nor the chief officer being called as a witness in the Court below, and it is also contrary to their uncontradicted testimony before the Court of Enquiry at Calcutta (fols. 75, 77), and was duly excepted to by us (18th exception, fol. 101), and it is expressly testified at folio 70, and is not contradicted, that these port rules had the force of law in that—

> "All persons within the limits of the ports or places "therein named are conclusively presumed to know "them. No actual notice of their existence need be "given to any person before they can be found guilty of "a breach thereof."

The respondents' claim that Schneider, the pilot, or harbor master, participated in the violation is negatived by his sworn statement that he was in the cabin writing at the time (Record, fol. 80).

The breach of the port rules as to lanterns is also found as a fact by the Marine Court at Calcutta in its report (fol. 82).

The case, therefore, upon this point resolves itself into this: A statute orders certain precautions to be taken to prevent fires breaking out on vessels in port. Had such precautions been observed in this case they would have prevented this fire. The respondents' agents omitted to take the statutory precautions; the fire happened because of such omission. We submit that from such a state of facts a presumption of negligence arises as a matter of law, and even if it be only a rebuttable or disputable presumption, still, as the findings of fact do not either in terms or impliedly negative such presumption, it is conclusive.

As it is expressly found that the lamp was separated from the lantern (which, of course, could not have happened had the port rules been obeyed), and thereby caused the fire, there is no necessity to apply the doctrine of *The Pennsylvania*, concerning the presumption that where a violation of a statute is followed by a disaster, the violation is to be presumed to have caused or contributed to the disaster, unless it be proved that it could not possibly have done so.

It seems hardly necessary in a court of admiralty to cite many authorities in support of a principle of every-day application, and we will content ourselves with the following citations showing that the doctrine is not confined to courts of admiralty, but is of universal application:

"The violation of any statutory or valid municipal "regulation, established for the purpose of protecting "persons or property from injury, is of itself sufficient to "prove such a breach of duty as will sustain a private "action for negligence, if the other element of actionable "negligence concur. Thus the violation of a statute or "ordinance regulating the speed of vehicles, horses or "trains, or requiring special signals or warnings to be "given upon their approach, or lights to be shown, is "such a breach of duty as may be made the foundation "of an action by any person belonging to the class "intended to be protected by such regulation provided he "is specially injured thereby."

Shearman & Redfield on Negligence, 4th Ed., § 13.

"The law made it the duty of the defendant to fend its "slack pile, and, if it did not do so, and as a result of its "negligence in failing to comply with its legal duty in "this regard, the plaintiff received the injuries complained "of, the defendant is liable."

McDonald *v.* Union Pacific Ry. Co., 42 Fed. Rep., 579.

Mr. Justice Brown, when District Judge, said in the case of Richelieu, &c., Navigation Co. *vs.* Boston Marine Ins. Co. (26 Fed. Rep., 596):

"In this connection we understand it to be the law that "the violation of a statutory obligation or a proved "neglect to conform to the requirements of good seaman-"ship followed by a disaster, raises the presumption that "such neglect contributed to it. This has been reiterated "so many times in collision cases as to have become "elementary."

Lownd. Col., 88.
The Genessee Chief, 12 How., 447–463.
The De Soto, 5 How., 465.
The Pennsylvania, 19 Wall., 136.
The Fenham, L. R., 3 P. C., 212.
The Lion, 1 Spr., 44, 40.
The Northern Indiana, 3 Blatch., 92, 106.
The Leo, 11 Blatch., 225.
Voorwarts & Khedive, 5 App. Cas., 894, 900.

"In Taylor *v.* Harwood, Taney, 437, 444, the Chief "Justice stated in general terms, that 'the omission of a "'known legal duty is such strong evidence of negligence "'and carelessness, that in every case of collision hap-"'pening under such circumstances, I should hold the "'offending vessel as altogether at fault, unless clear and "'undisputable evidence established the contrary.' We "inderstand this principle to be of general application in "all actions where the question of negligence is involved."

The same doctrine has also, however, been applied by the Supreme Court to a similar state of facts obtaining on land, for example, to cases where railroad companies are sued for damages occasioned by collision with one of their trains where they have omitted to obey an ordinance of a city council requiring the erection of fences or gates along the line of their road.

Philadelphia, &c., R. R. Co. *v.* Kerr, 25 Md., 521.
Billings *v.* Boring, 45 Mich., 65.
New Orleans, &c., R. R. Co. *v.* Tereline, 59 Miss., 284.
Artz *vs.* Chicago, &c., R. R. Co., 34 Iowa, 153.
Galena, &c., R. R. Co. *vs.* Loomis, 13 Ill., 548.
Chicago, &c., R. R. Co. *vs.* Lee, 68 Ill., 576.
Dimick *vs.* Chicago, &c., R. R. Co., 80 Ill., 338.
Bradley *vs.* Boston, &c., R. R. Co., 2 Cush. (Mass.), 539.
Dodge *vs.* Burlington, &c., R. R. Co., 34 Iowa, 276.
Madison, &c., R. R. Co. *vs.* Taffe, 37 Ind., 361.
Norton *vs.* Eastern R. R. Co., 113 Mass., 366.
Prescott *vs.* Same, 113 *Id.*, 370.
Pollock *vs.* Same, 124 *Id.*, 158.
Augusta, &c., R. R. Co. *vs.* McElmurry, 24 Ga., 75.

In the case of Cayger *v.* Taylor, 76 Mass., 280, the defendant was held liable for neglect to supply a boiler with a safety fusible plug, as required by local law, although a custom to treat the law as a "dead letter" was proved.

Point IV.

CONTRIBUTION IN GENERAL AVERAGE CANNOT BE ALLOWED FOR A SACRIFICE OF PART OF THE INTERESTS ASSOCIATED IN A MARITIME ADVENTURE, UNLESS THE SACRIFICE BE THE ACT OF THE MASTER OR OF SOME QUALIFIED PERSON LAWFULLY ACTING IN HIS PLACE AND CHARGED WITH THE PROTECTION OF THE SAME INTERESTS AND NO OTHERS.

It clearly appeared in the evidence in this case (Record, fols. 76, 85, 86, 91), that what Captain McManus judged to be for the best interests of the adventure was, the fire being in the extreme bow, to discharge cargo from the main and after hatches; the port authorities, however, judged otherwise, and used the authority vested in them by local law to override the master's judgment and to enforce their own view, and against their action in so overruling him the master, on February 29th, noted his protest, and on May 19th, extended it under oath, his extended protest setting forth the facts and concluding (fol. 91):

> "And these said appearers do protest, and I, the said "notary, do also protest against the aforesaid fire, ground- "ing, refusal to allow the discharge of cargo, and all "other accidents and occurrences, and all loss and damage "occasioned thereby."

And the reason for this difference of opinion between the captain and the authorities as to the course to be followed, is equally plain upon the evidence. It arose from the fact that they did not look at the question from the same standpoint. Captain McManus knowing, as the master of a merchant vessel is bound to know, the relative values of the vessel and cargo, the elements of the law of general average, the stowage of the cargo on his own vessel and the position of the chain lockers, and the *locale* of the fire with reference to the cargo; knowing also that the cost of repairing the damage sustained by vessel and cargo, through actual burning of a portion of both while the discharge was going on, was inconsiderable, if not infinitesimal, compared with total ruin to the hull by bursting apart, and large injury to cargo by wetting, which invariably results when a vessel loaded with a tightly packed cargo of jute is scuttled and submerged; knowing all these things, he decided that to discharge

cargo was for the best interest of all concerned, and although the additional supply of air to the fire through the opening of the after hatches might increase its volume and cause it to burn through the forward deck before the discharge was finished, he was willing to run this risk as being for the ultimate advantage of the adventure committed to his charge.

The port authorities, on the other hand, concerned themselves with other interests, their chief concern, in fact it might almost be said their only concern, being, as implied by their official title, "Conservators of the Port," &c., &c., the safety of the port of Calcutta. So long, therefore, as the fire on the *J. W. Parker* could, by any means at their command, be prevented from breaking out on deck, the safety of the port was assured beyond peradventure, and to compass this result they were prepared to sacrifice, and did in fact sacrifice, almost the whole (81 per cent.) of the adventure.

It was claimed by the respondents in the Court below that there was, in fact, no danger to the port of Calcutta from the fire on the *J. W. Parker*.

To this we answer, that the port authorities must necessarily have decided otherwise at the time, for not only was the captain, the legal representative of the owners of ship, freight and cargo, on the spot and prepared to act in their behalf, but he was reinforced by the presence of the libellants' assistant, Mr. King, and the only reason the port authorities could have for overruling the master's plans was that his plans endangered interests which they were appointed to protect.

Upon this state of facts we submit that the claim for general average contribution set up by the respondents' answer, and allowed by the Court, cannot be sustained.

It is said in most of the text books and cases, in discussing the question of a general average sacrifice, that it must be by the master. We do not, however, attach the least importance to any technical use of the word master. We admit that the sacrifice is equally good, whether made by the master or by the officer in charge during the absence of the master. We do, however, most earnestly insist that before contribution in general average can be compelled for a sacrifice, it must be shown that the person who ordered the sacrifice was either the master or some one lawfully charged with the master's duties and responsibilities, and none other or further.

The foundation of the claim for general average is said to rest in the highest equity.

Patten *v.* Darling, 1 Cliff, 262;
Barnard *v.* Adams, 10 How., 303,

and equality is equity, hence a sacrifice borne by one or two interests for the benefit of all three should be contributed for by each of the others in order to make the burden of the sacrifice equal, that is, equitable and fair, and there is no case in the books in which a general average contribution has been sustained where the principle has not been observed.

The case of the *J. W. Parker*, as stated in the adjustment made up by Mr. Telfair, is not within this doctrine, for it appears that the person charged with the care of these three interests wanted certain things to be done, and would have caused them to be done, had he not been prevented from so doing by a paramount authority entitled to enforce obedience by summary arrest, to wit, that of the port officials.

Hence, applying the principle by which all claims for general average must stand or fall, it follows that before an adjustment could be equitably, and since law is equity, we may add legally, made up it would be necessary to bring into the contribution the fourth interest, that of the port of Calcutta and its shipping. This, however, the adjustment does not profess to do, and the Court cannot do, because the right of contribution which is annexed to the contract of affreightment is a right of contribution between the parties to the adventure solely. It may seem harsh to say that the Port of Calcutta should take benefits, to the cost of which it should not be called upon to contribute, but the case in this respect falls under a well settled rule of law, that damage done under authority of a statute can only be compensated for under the provisions of the same or another statute, or, as it is sometimes expressed, damage done by operation of law rests where it falls, unless otherwise prescribed by law.

Case of Saltpetre, 12 Coke, 13, 16.
Governor, &c., *v.* Meredith, 4 Term Rep., 794.
Respublica *v.* Sparhawk, 1 Dall., 383.
Mayor *v.* Lord, 17 Wend., 285.
Affirmed, 18 Wend., 126.
Russell *v.* Mayor, &c., of New York, 2 Denio.
Mayor, &c., *v.* Peuty, 25 Wend., 157.
Lord *v.* Mayor, &c., 3 Hill, 426.

There is no law either in India or here which authorizes compensation to be made in this case, and the Court cannot assume to do that which the Legislature might have done but did not do. The Court's authority is limited to claims of contribution between the parties to the adventure, and we submit that there is no expert authority and no reported case sustaining a contribution where an alleged General Average Act has been done against the wish and protest of the person to whom the parties and the law have committed the responsibility of determining the necessity for such acts. It is true that the laws obtaining at Calcutta were equally binding upon all the parties to this adventure, but they were binding in that under them their property was exposed to be totally lost or partially destroyed by the action of the port authorities without redress or compensation from any one; but that is a totally different thing from providing that their property should be held liable to make good the damage sustained by other people's property. This latter is a totally distinct obligation, which must be imposed either by positive statute or by contract; and, as we have seen, there is neither in this case.

The only case in which the facts at all resemble those of the case at bar, which we are able by a somewhat extensive search to discover, is the case of

> Wamsutta Mills *v.* Old Colony Steamboat Co., 137 Mass., 471.

The case at bar presents facts that make even more strongly for the principle for which we contend than the Wamsutta Mills case, for the reason that the extinguishing of fire in that case was done by the city fire department, neither the mate nor the master made the least objection to what the fire department did. It is expressly found that what the fire department did was necessary to be done, and it nowhere appears that, had the master or mate objected or resisted the action of the fire department, that the latter had power to compel obedience by arrest, as was the case in the *J. W. Parker*.

The Massachusetts Supreme Judicial Court says, by Field, *J.*:

> "In taking possession of property for the purpose of "extinguishing the fire that threatens to spread to other "property, the chief engineer (of the fire department)

"does not act as agent of the owner, but under a para-
"mount right, if, indeed, the fire does not endanger the
"property of others he may act merely as the agent of the
"owner; but if the safety of other property is imperilled
"he must act under his public responsibility. If persons
"are employed to render a service, the service is paid
"for by those who employ them, but the members
"of a fire department, in the ordinary performance of
"their duties, are public officers and are paid by the
"municipality. It is clear in the case at bar, that the
"chief engineer and his men were not employed to ex-
"tinguish the fire by any person lawfully in charge of
"the steamship, but they acted under their public em-
"ployment. Although what they did was done without
"objection by the mate, or by the master after he ar-
"rived, yet they did not act under the direction of either
"master or mate. Suppose the chief engineer had
"brought the libel against the steamship and cargo for
"salvage, could he have maintained it for his services in
"putting out the fire without regard to his service in
"pumping out the steamship after she sank? We think
"not."

The Mary Frost, 2 Woods, 306.

"To constitute a general average loss there must be an
"intentional sacrifice of a part of the property, for the
"purpose of saving the remainder from a common peril,
"or extraordinary expenditures must be incurred for the
"purpose of saving the property in peril. The authority
"to determine when a sacrifice should be made, and
"what property sacrificed, rests with the master or
"other person lawfully in command of the ship. His
"right to sacrifice the property of other persons than the
"ship owner is derived from necessity whereby, in cir-
"cumstances of great peril, he becomes the agent of all
"persons whose property in the common adventure is in
"peril. If this property is injured or destroyed by
"strangers to the ship and cargo, who are not employed
"by the master or other persons in command, it is not a
"general average loss. This is evident, if the act of the
"stranger is a tort, but we do not see that it makes any
"difference in principle, if the act of the stranger is justi-
"fiable, on the ground of a public and paramount right.

"The distinction between the fire put out by the au-
"thority of the master or other person in command, and
"one put out by public authority, without regard to the
"will of the master, we think, is sound.

"When a ship has been brought to a wharf it has be-
"come subject to municipal control, if that control is

" exercised, and the general maritime law does not cover
" the municipal rights and obligations of the parties to the
" maritime adventure, so far as the consequences of this
" control are concerned, but they are to be determined by
" the municipal law."

In the Court below the respondents cited two cases:

The Merrimac, 1 Ben., 201.
Price *v.* Noble, 1 Taunton, 123.

We submit that they are not against us, even if authorities in this Court, since the first was not a case of general average at all, but of salvage, and in the last case the master, having been removed by the captors, the mate approved of and assisted in the jettison in question.

The respondents argued in the Court below that the York-Antwerp rules were adopted by the charter-party (fol. 40), and the general average bond (fol. 57), and as they did not require the general average act to be done by the Master, nor declare that no right of contribution could arise in favor of the party whose negligence caused the disaster, that, therefore, our objections on these points could not be considered even though the law were as claimed by us. The answer to this is that the charter-party and bond were carefully drawn so as to preserve to the parties their rights under the laws of the place of destination, and that, therefore, the rules are to be used as a guide to the method of making up an adjustment only in cases where by said law there is a right of general average contribution.

And even if there were no express saving of the "laws," &c., of the port of destination, the result would be the same, since the York-Antwerp Rules nowhere attempt to define the essentials of a general average act; that is assumed as settled by law, and the rules go on to point out what consequences and incidents of such acts shall also be treated as general average, and similar details concerning the practice of adjusting.

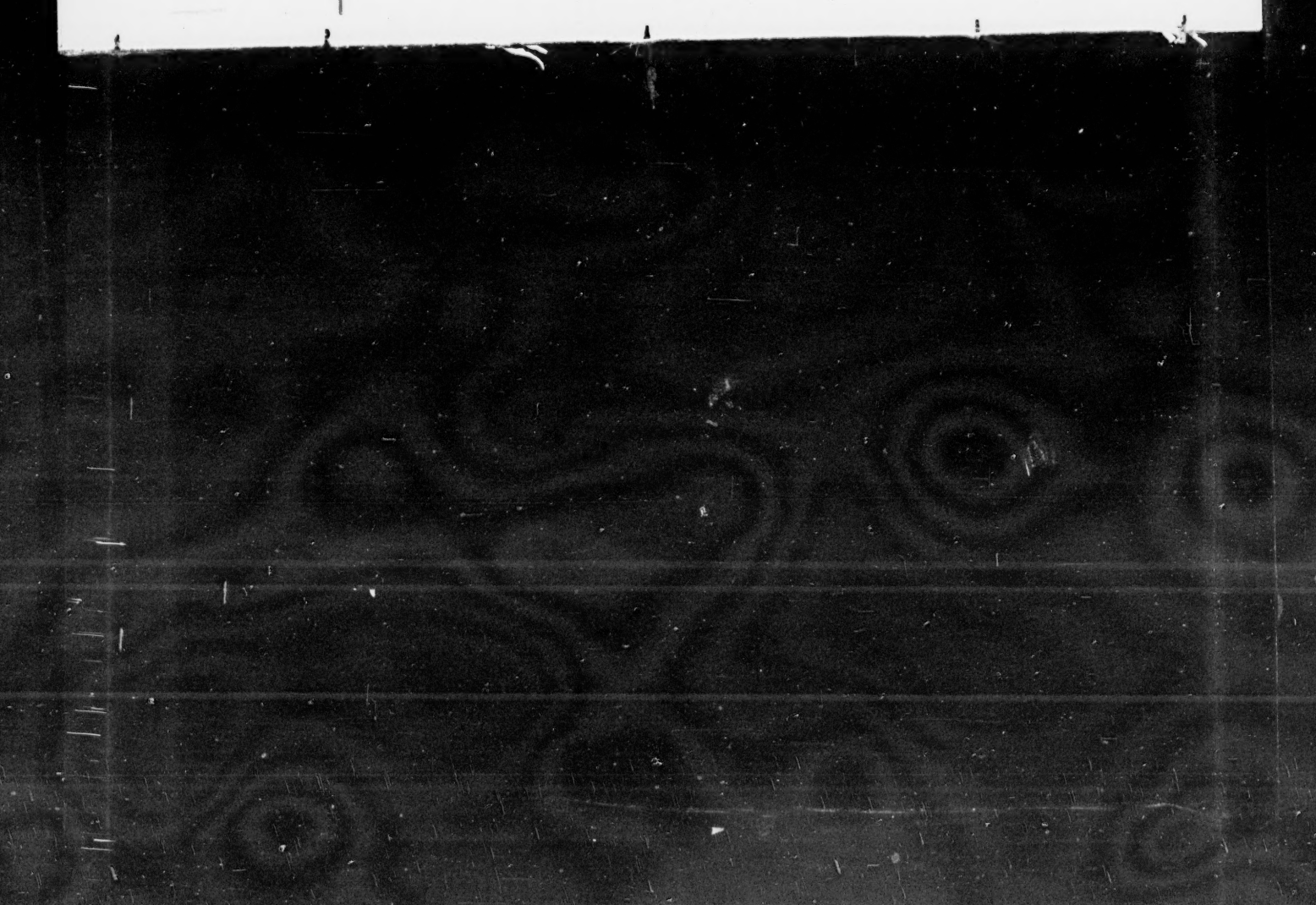
The respondents' argument goes too far, since there is nothing in the York-Antwerp Rules by themselves to hinder a vessel owner from claiming contribution from cargo for a stranding necessitated by his felony in setting fire to it.

Point V.

THE DECREE APPEALED FROM SHOULD BE REVERSED, WITH COSTS TO THE APPELLANTS, AND THE CAUSE REMANDED, WITH DIRECTIONS TO ENTER A DECREE IN FAVOR OF LIBELLANTS FOR THE AMOUNT RECEIVED BY THE MASTER FROM THE SALE OF THEIR GOODS AT CALCUTTA, LESS THE AMOUNT PAID INTO THE DISTRICT COURT, TOGETHER WITH INTEREST AND THEIR TAXED COSTS IN ALL COURTS.

Dated New York, March 5th, 1894.

SIDNEY CHUBB,
Of Counsel for Appellants.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

No. 299.

STEPHEN A. BALLI AND OTHERS,
Libellants and Appellants,

vs.

HOWARD D. TROOP AND OTHERS,
Appellees.

BRIEF FOR APPELLEES.

HARRINGTON PUTNAM,
Counsel.

Supreme Court of the United States.

STEPHEN A. RALLI and others,
Appellants,

AGAINST

HOWARD D. TROOP and others,
Appellees.

No. 299.
Reported below, 37 Fed. Rep., 888.

BRIEF FOR APPELLEES.

Libellants have appealed from a decree of the Circuit Court for the Southern District of New York, affirming a decree of the District Court for the amount adjudged to be due them under an average adjustment of the bark *J. W. Parker* and cargo, with interest and clerk's fees.

After entry of the decree, the appellants were paid the full amount adjudged to them, and a receipt therefor appears at the foot of the decree (Record, p. 20).

THE LIBEL avers a fire to have broken out on the bark *J. W. Parker* on February 18, 1886, and that a part of the libellants' cargo of jute cuttings was sold by the master thereafter, that said jute or its proceeds have been demanded and are valued at $22,000, for which sum libellants ask a decree.

THE ANSWER admits the breaking out of a fire, alleges various general average charges incurred by reason thereof, and sets forth a bond and adjustment at New York, whereby the sum of $7,420.48 was found due the

cargo shipped by libellants. It denies any liability except for the amount adjusted as due the cargo in the general average, which sum was deposited in Court.

The learned District Judge examined all the questions raised upon the trial, and held the general average to have been properly made and stated, and filed an opinion (pp. 8–13 of the Record), with which the Circuit Judge entirely concurred (p. 23 of Record).

The detailed facts appear in the findings of the Court at pages 20, 23 of the Record.

POINTS.

I.—The exceptions to the findings of the Court below are not well taken.

The first exception as to the firm of Ralli Brothers assails the finding of the Court made on the evidence of their employee, Mr. Craymer, that he was an assistant in "the Calcutta house of Messrs. Ralli Brothers, and that they also have a house trading in New York of the same name" (p. 35 of the Record). The immateriality in any view of such an exception needs no comment.

The second exception to the sixth finding by the Court merely raises the question of law whether a port by-law is presumed to be known to foreign vessels without any actual notice, and is discussed under the III. point.

The third, fourth, fifth, sixth seventh, eighth and ninth exceptions are unnecessary to be discussed, as they merely concern matters of evidence, and not ultimate facts necessary to the findings.

The other exceptions are mostly to refusals of the Court to find requests that are inconsistent with other findings already made (some without exception by the aplaats), and are therefore not open in this Court for argument.

II.—The exception to the ruling of the Court below excluding certain *ex parte* depositions taken at Calcutta before a so-called marine Court (p. 38 of the Record) cannot be sustained.

The learned Court received these statements so far as made by the master and officers of the ship, but excluded the statements of other persons. The libellants' counsel excepted to the exclusion of the statements of Forsyth (subsequently examined by him), and of Schneider, the pilot on board. The only point open for discussion is as to the exclusion of the statement of pilot Schneider.

The District Judge held in his opinion (p. 10 of the Record): "The proceedings of the marine Court of Inquiry at Calcutta are not competent evidence here."

In the case of Rutherford *vs.* Geddes, 4 Wall., 220, also an admiralty cause, Justice Miller (p. 224) said:

"The depositions relied on by appellant were properly ruled out, for the reason that they were taken without notice to defendants, in another suit to which defendants were not parties, and in which they had no right or opportunity to cross-examine the witnesses; nor were defendants in any manner privies to either party in the former suit, in which the depositions had been taken. This alone, it is well settled, is a sufficient reason for their exclusion."

Regarded as an inquiry or investigation by special officials they are also inadmissible.

The *Henry Coxon*, 3 P. D., 156.
Nothard *v.* Pepper, 17 C. B. (N. S.), 39.
The *Palermo*, 9 P. D., 6.

The former British law making them *prima facie* evidence (17 and 18 Vict., Ch. 4, Sect. 449) has been expressly repealed by Shipping Law of 1876 (39 and 40 Vict., Ch. 80, Sect. 45).

III.—The cause of the fire was accidental, not through any negligence of the respondents.

There was no suggestion of any neglect of the ship on the first formulated statement of objections to this adjustment by the cargo underwriters, made December 13, 1886 (p. 31 of the Record).

No charge of negligence is made in the libel. The averment is that "fire broke out, and said bark was so badly damaged as to become unseaworthy" (Article Third of the libel, p. 1).

Even after the decision of the District Court there was no amendment of the pleadings sought; but, on the contrary, the petition of appeal stated that the appellants intended to have the said cause heard anew on the pleadings and proofs in the District Court (p. 17 of the Record).

The finding of the Court (6th finding of fact) that it cannot be ascertained how the accident took place, whether by the accidental breaking of the glass or by Edwards' act in removing the lamp from the lantern, is not excepted to.

In the absence of proof, through the death of the seaman engaged in the duty of stowing chain, the presumption is that the cause was accidental rather than by culpable fault.

The only ground therefore of imputing fault is the alleged infraction of the port by-law, requiring lanterns closed by lock and key.

The practical disregard of this by-law by the port authorities is clearly stated in the opinion of the learned District Judge at page 10 of the Record.

Fire in a cargo is different from other accidents—as Judge Simonton says: "A cotton fire is always dangerous, inscrutable, treacherous. In the hold of a ship it is the more dangerous, as its exact locality, extent and progress are unknown." The *Cherokee*, 31 F. R., 167, 168.

It is because of the difficulty of ever determining whether a fire is due to *tort* or *cas fortuit* that both in England and in the United States the shipowner cannot be made liable for losses by fire.

By 17 and 18 Vic., ch. 104, sec. 503, it is enacted:

"No owner of any seagoing ship or share therein shall be liable to make good any loss or damage that may happen without his actual fault or privity, of or to any of the following things (that is to say):

(1.) Of or to any goods, merchandise or other things whatsoever, taken in or put on board any such ship by reason of any fire happening on board such ship.

(2.) * * * To any extent whatever."

Section 4288 of the Revised Statues provides:

"No owner of any vessel shall be liable to answer for, or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel by reason or by means of any fire happening to or on board any such vessel unless such fire is caused by the design or neglect of such owner."

As was said by the learned District Judge:

"To deny the owners the benefit of a general average contribution on the ground of negligence would impose upon them, in effect, a liability for the fire from which the statute exempts them" (p. 9 of the Record).

Where the shipowner has an exemption against fault of his servants, he is held entitled to general average, the same as if the fault were that of an entire stranger.

Strang *vs.* Steel, 14 Appeal Cases, 601.

The *Carron Park*, 15 P. D., 203, 207.

IV.—The acts of the fire department were proper, and for the benefit of vessel and cargo.

No conflict of authority between them and the master occurred, except as to his request to take out cargo from the hatches aft. This he was not permitted to do until the next day after the fire broke out. The prompt pouring down of water the first time the fire broke out, held it in check, and the measures so energetically taken by the

mate were simply allowed to take natural course for the succeeding eighteen hours. Indeed, so much water had been pumped in by the men aiding the mate, that, according to the protest, in the evening, gangs of men came off from shore and pumped the ship dry; that is, so that the pumps sucked, of course leaving a great amount of water soaking and absorbed in the cargo. It is evident that the port officials did little more than to pump in steam and acids.

The acts of the ship's officers were not superseded or annulled. (The *Cherokee*, 31 F. R., 170.) The fire officials co-operated with and continued the procedure started by the mate.

Considering the frequency and peculiar dangers of jute fires, every presumption is in favor of the procedure of the port officials as the best means that could be taken by them to subdue and quench the fire.

The appellants' eleventh and twelfth exceptions (pp. 50 and 51) to the refusal of the Court to make findings of fact are not only unsustained, and seek to draw inferences contrary to that reasonable presumption of good faith and regularity that attaches to all official acts, but are contrary to findings made by the Court without exception.

The learned Circuit Court has found that the measures taken by the mate before the port authorities took charge of the ship and those subsequently taken by the port authorities were the best available means to extinguish the fire and save greater loss upon the cargo (fifth finding), and *this finding is not excepted to.*

V.—There can be no doubt that this is a general average loss and sacrifice.

Rule 3 of York-Antwerp rules is decisive.

"Rule III.—Extinguishing Fire on Shipboard.—Damage done to a ship and cargo or either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average; except that no compensation be made for damage done by water to packages which have been on fire" (p. 31).

The rule contains no limitation as to the point whether the act was by the master, mate, pilot, port officer in charge, or harbor officials.

In the case at bar, the action of the port authorities was not independent, but supplemental.

The fact that the port officials took charge cannot in any event efface or render nugatory what the ship's officers had already done.

All the *water pumped in* on the first day was by the vessel's own officers.

The port fire engines pumped in steam and fire extinguishing chemicals.

Fourth and Fifth Findings, p. 21.

Early in the morning of the day after the fire the raising of the decks and starting of the beams was observed.

Seventh Finding, p. 22.

An act, however, is not less a general average sacrifice because the same is under direction of the port officials.

Assuming, for the sake of argument, that the destruction of the ship is due in part to the acts of the port officials in scuttling (although it is submitted she was already in law a potential wreck, by reason of the expansion of cargo, which had already begun), still such action, by the port officials, does not deprive the vessel of contribution.

The word voluntary, used in general average definitions, means *intentional act of man*, as distinguished from the immediate physical effect of the elements or a sea peril.

Gourlie, General Average, p. 42.

If an act be for the general benefit and successful, it is not the less an average sacrifice, that it was not ordered by the ship's officials. In the case of the *Merrimac*, 1 Ben., 201, a steamboat having a regiment of soldiers aboard was in danger of foundering. The master, unable by the exertions of his crew to keep down the leak, had recourse to the commanding officer, who took charge, and

by military discipline succeeded in saving the ship. Judge Benedict awarded salvage to the whole regiment under his command, although their action had been compulsory; and there can be no doubt that any cargo on board would have been bound to contribute on the general average principle, although the efforts and sacrifices were not ordered by the master of the vessel.

The same could be true of extraordinary action of a pilot, who should take charge and perform some act of general benefit to the vessel and cargo.

A tugboat towing in a disabled vessel may, by its captain, take charge and for the time displace the master. Is it, therefore, any less general average if the results of the new commanding head of the adventure succeed in the safety of the general interest?

In Stevens & Benecke on Average, p. 100 (Phillips' Ed., Boston, 1833), it is said that

"A sacrifice thus made by the order of the master alone belongs undoubtedly to general average. *Even the opposite case may be imagined where a necessary sacrifice made by the crew in opposition to the master's will could not in justice be excluded from it.*"

The same is confirmed in Mr. Gourlie's Treatise, p. 42.

The only Code at hand which seems to prescribe that a sacrifice shall be made by the master is the Commercial Code of Germany (Art. 702).

Ulrich, in his Haverei Gesetze, p. 6, commenting on this, says:

"*By the shipmaster or his order.* The rule that the losses must have been caused by the shipmaster, or his order, is directed principally against arbitrary interference by the crew. * * * By *master*, the commander of the vessel at the time is meant. If, therefore, during the temporary absence of the master, and while the next officer of the ship has command of the vessel—*e. g.*, if the vessel should be lying in the roadstead, ready to sail, while the master is ashore to arrange the ship's papers—a storm should suddenly arise, making it necessary to slip the anchor chain, and the commanding officer orders this sacrifice, then it is to be considered a case of general average (Prot., p. 4078). With regard to the pilot as the master's representative no rule was formulated in the

Code, since circumstances are so different (Prot., p. 4078). Where the pilot, according to law or local custom, takes the command, he is to be considered the master's representative. If, therefore, a peril should be encountered during the time that the pilot has command of the vessel, the case is supposable that the pilot might order a sacrifice in conflict with the master (*im Wiederspruche mit dem Schiffer ein opfer anordnet*), without thereby depriving the sacrifice of the character of a general average loss."

An early English case illustrates the doctrine of general average sacrifice under the compulsory authority of a stranger.

The ship *Brothers* was captured by a French privateer and a prize master and crew put in charge over the English mate, who remained under the control of his captors. A storm arose and ship's stores were jettisoned for the common safety with the assistance and approval of the mate. Afterwards, the vessel was retaken and an action for contribution was brought by the shipowner against the cargo. Sir James Mansfield, in the Exchequer Chamber, directed a verdict for the plaintiffs, which was sustained *in banc*, although it was argued that the sacrifice in this case was not dictated by the master and mariners of the ship, but by strangers to whom the owners of the ship and cargo had not delegated any discretion.

Price *v.* Noble, 4 Taunton, 123.

As to the *person* making the sacrifice, the law shows a change developing with the modifications of shipping commerce.

In the *Consolato*, no sacrifice is to be made without consulting the *merchant* who was always presumed to be on board in accordance with the mediæval customs, and provision was made that the *first* act of jettison should be by him.

Chap. 54 of the *Consolato*, tells how the merchants should be addressed before a jettison:

"Gentlemen merchants (*Senyors, mercaders*) If we do not lighten the vessel we are in great risk and in great dan-

ger of losing the lives and the goods of all that are on board; and if you others gentlemen merchants, are willing that we should lighten the vessel with the will of God we may be able to extricate the lives and the greater part of the goods, and if we do not cast overboard, we shall be at the risk of losing ourselves and all our property. And if the merchants agree to cast overboard all, or the greater part they may thereupon cast overboard, *but one of the merchants, if all cannot, ought to begin to cast overboard*, and when the merchant or the merchants have cast something overboard, the managing owner of the ship may then cast overboard and cause to be cast overboard until they are saved."

3 *Black Bk., Adm.*, p. 155.

In the supercargo's absence, the managing owner of the vessel was required to initiate the sacrifice. *Ibid.*

The modern authorities, as above cited, show that any person having lawful custody of the ship and power to compel obedience to his orders, may perform a general average act—the only condition being that it is an intentional sacrifice for the general good to avert a peril threatening the whole adventure.

Thus in Walker *v.* The U. S. Insurance Co., 11 Ser. & Rawl., 61, Chief Justice Gibson said, an accidental loss is not a subject of general average. "It is necessary that the loss should arise from the direct agency of *some one acting for the general benefit.*"

Which accords with the definition of Casaregis, Disc., 121, *n.* 3.

"*Damnum ob quod contributio facienda est, tale esse debere, ut voluntarie sit illatum, id est, aliquo hominis facto, qui illud elegerit, ut res aliorum servarentur.*"

It is unnecessary to cite the authorities of general average arising from fire on shipboard. They are ably collated in Mr. Gourlie's General Average (pp. 154, 156), and by Mr. Lowndes in the last edition (p. 68). The leading cases in the United States are Nimick *vs.* Holmes, 25 Penn. St., 355, and Lee *vs.* Grinnell, 5 Duer, 400, and Heye *vs.* North German Lloyd, 36 Fed. Rep., 705. Since the decision of this case below, the principle stated by the learned District

Judge has been followed in the *Roanoke*, 46 F. R., 297, and the *Rapid Transit*, 52 F. R., 320.

It would have a most prejudicial effect, if the principles of general average were not to be upheld after port authorities were to take charge. It would induce shipmasters not to render prompt obedience to constituted authority. Such a rule would tend to prevent the interests endangered by fire from accepting the full benefit of all the facilities at the disposition of the harbor officials. It is the principle of the latest jurisprudence to extend, rather than to restrict, the application of the principles of general average, which

The case of the Wamsutta Mills *vs.* The Old Colony Steamboat Co., 137 Mass., 471, cannot apply to the case at bar, because that decision rests on the distinctions (*a*), that after the vessel has been brought to a wharf, the Massachusetts Court considered that it stood no differently from other property within the municipality; (*b*), that the pouring in of water was entirely by the fire engines on land, with the mate and crew of the steamboat acting merely as passive spectators; (*c.*) there was no adoption in the bills of lading of the York-Antwerp rules of General Average, nor did there appear to be any express contract relating to the subject of general average.

VI.—The series of acts, which are the foundation of this general average, are first, those of the mate, officers and crew *before* the port authorities took control; second, those of the port authorities during the fire; third, those of the master, after the fire was quenched.

The first two are found by the Court, without exception, to have been the best available to extinguish the fire and preserve the cargo (Fifth finding) and in respect to the third, it is also found by the Court, without exception, that the master acted "for the best interests of all concerned" (Eighth finding).

It is therefore unnecessary to discuss the position urged at Point IV. of the brief for appellants, that the action of the port authorities was not for the interest of vessel and cargo.

VII.—The decree appealed from should be affirmed, with costs.

HARRINGTON PUTNAM,
Counsel for Appellees.

March 15, 1894.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1893

No. 299

STEPHEN A. RALLI AND OTHERS
Libellants and Appellants

vs.

HOWARD D. TROOP AND OTHERS
Appellees

SUPPLEMENTARY SUGGESTIONS ON BEHALF OF THE APPELLEES

HARRINGTON PUTNAM
Counsel

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

OCTOBER TERM, 1893.

STEPHEN A. RALLI and others, Appellants, AGAINST HOWARD D. TROOP and others, Appellees.	No. 299.

Supplementary Suggestions on behalf of the Appellees.

Under the liberty granted in the order restoring the cause to the docket for reargument, the appellees submit these additional observations:

The decision of the Supreme Court of Massachusetts in the Wamsutta Mills case, 137 Mass., 471, was distinguished from the case at bar in the original brief for the appellees. So far as it is any authority for a limitation of the doctrine of general average sacrifice, that it must be the act of the master, and not of other competent officials, like the lawfully constituted port authorities, it is submitted to be at variance with fundamental principles of the law of general average.

The dictum of the Massachusetts Court makes the question of a general average sacrifice turn on the person by whose order the act is committed. Mr. Justice Field limits this to the Master, with the possible extension (which counsel for the appellants makes in his brief), also to the mate, who becomes acting master, during the absence or disability of the captain. If this be the rule, it must be because

the cargo or other interests to be affected have contracted beforehand to give authority to make necessary sacrifices to the master or to his representative.

If the law of general average rests on the principles of contract—if the right to make a sacrifice is derived from the law of agency—then it may well be that only the designated agent, or his substitute can perform an act which shall be binding upon the cargo owners.

The question therefore turns upon the elementary principles of general average law, as administered by commercial and maritime courts.

The text of Paulus from the Rhodian law, "*Omnium contributione sarciatur quod pro omnibus datum est*," is not deduced by Peckius from contract, but is said by him to rest on the highest equity—

"*optima aequitate constituit, ad id quod omnes salvat, omnes quoque contribuere debere.*" Peckius, *ad Rem Nauticam*, by Vinnius (Ed. Amsterdam, 1668), p. 191.

So Judge Story says of general average:

"The principle upon which this contribution is founded is not the result of contract, but has its origin in the plain dictates of natural law" (1 Story, Eq. Jur., § 490.

Other definitions also derive this right of contribution from the equity of the benefit received and not from any prior contractual obligation.

"General average," said Lord Stowell, in the *Copenhagen*, 1 Ch. Robinson, 289, 293,

"is for a loss incurred towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole."

In Birkley *vs.* Praesgrave, 1 East., 228, Mr. Justice Lawrence propounded the definition:

"All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo, come within general average, and must be borne proportionably by all who are interested. *Natural justice requires this.*"

Mr. Justice Curtis, citing many authorities, said:

"But this right to contribution does not arise from contract. It depends upon a principle of natural justice that they who have received a common benefit from a sacrifice, voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned." Sturgis *vs.* Cary, 2 Curtis, 384.

In Burton *vs.* English, 12 Q. B. D., p. 218, Lord Esher said of the original principle of general average:

"Lord Bromwell, in his judgment in *Wright* vs. *Marwood*, considers it to arise from an implied contract; but though I always have great doubts, where I differ from Lord Bramwell, I do not think that it forms any part of the contract to carry, and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England, as the law of the ocean. *It is not as a matter of contract*, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved."

In Mecker *vs.* Klemm, 11 Louisiana Ann., 104, the Court (*Lea, J.*) said of general average:

"If we refer to the principle upon which a liability for contribution to a general average loss is based, we find that it rests upon the broad and equitable doctrine that no one shall enrich himself at another's expense. * * * *It is an obligation, not based upon contract*, but one resting upon natural equity."

The same doctrine is stated by German authorities, who declare that general average can only be based

on the single legal principle of the community of interest of vessel, freight and cargo.*

This has been recognized by this Court. Mr. Justice Nelson delivering the opinion of the Court in a case touching the Act of Congress of 1845, enlarging the jurisdiction of the Admiralty, said:

"We think it also a matter of grave doubt if the act confers jurisdiction in cases of salvage, jettison or *general average. These are not matters of contract* according to the most eminent commentators on the subject, and they certainly are not cases of tort." The *Eagle*, 8 Wall., 15, 23.

From these fundamental principles it follows that the equity of contribution is not conditioned on the particular person who orders the sacrifice, but rather on the purpose of the act and the resulting benefit. That the act be one of choice, the will of man must contribute, as distinguished from the action of the elements (*The Star of Hope*, 9 Wallace, 203). To be a sacrifice, it must be directed by the will of one who is invested with control and authority over the different objects engaged in the common adventure. If, for the time, the law displaced the control of the master by a higher local authority which directed the sacrifice for the benefit of the interests on board, which are thereby preserved, is it therefore any less equitable that the interests benefitted thereby should contribute? Is not the presumption of judicious action and its resulting equity increased rather than diminished, when the act is by the lawful port officials? The intervention of an experienced chief of a port fireboat, with the mechanical and chemical means for extinguishing fire which modern municipalities have placed at his command, will have in its favor all the probabilities of good judgment and efficient execution of any orders resolved upon for

*"Den einzigen Richtsgrund bildet die Verwendung in der Interessengemeinschaft von Schiff, Fracht und Ladung." Endemann, Handbuch des Deutschen Handels- See- und Wechselrechts, Vol. IV., p. 285 (Leipzig, 1884).

the general preservation. The port official is, above all, disinterested, indifferent and impartial to the special claims of either cargo or vessel. The ship master is the paid representative of the vessel owner and to that extent inevitably biased in favor of his own employer.

While the judgment of the master, based on his nautical experience, may be deemed important in cases involving navigation and seamanship, his experience regarding fires must necessarily be limited —cases are fortunately rare where the same master ever twice faces the peril of his cargo afire under the ship's decks—while the fire boats of a great port are constantly dealing with such outbreaks on vessels loading and discharging. The principle of presumed competency derived from experience is recognized in general average law. Thus an authority of great weight says the master may proceed to make a sacrifice without consent of the merchants on board:

"Because it is presumed the master and his crew have more experience in maritime affairs than the merchants; and Q. Van Weytsen says: 'everyone is most learned in his own trade or calling'" Stevens and Benecke on General Average, by Phillips, p. 64, (Boston, 1833).

The courts should therefore sustain the port officers in assuming control, not only on the general presumption of the correctness of official acts, but because of their proved experience, facilities and skill in promptly coping with a danger to commerce, vastly increased in modern times by the use of steam, and that pressure for dispatch which often causes vessels to be laden by night work.

No nation has greater interests in sustaining this principle than the United States. It was a court of this country which first accepted as general average the consequences of water poured into a vessel's hold to extinguish fire—a principle only followed by England since 1873, though now common to the codes and jurisprudence of the commercial

world. No branch of our sea commerce is more entitled to the protection of the law of general average than our cotton trade. The ports of New Orleans, Galveston, Mobile, Savannah, Charleston and Norfolk, not to speak of New York and Boston, abound in cotton fires. The dealing with these casualties probably gives rise to more questions of average than the cargo fires of all Europe combined. Whether the outbreak is on a vessel anchored in the stream, or alongside the quay, immediate response to the fire-alarm comes from the port engines either afloat or on land. Can any sound, practicable reason be given why water pumped or poured in by the ship's own pumps or buckets will give rise to general average, but the same element from the hose of a Fire Department tug should injure and destroy without right of contribution?

The mode of proceeding in putting out such a fire never essentially differs, except that the efficiency and discipline of the port officials secure more prompt results. In quenching fires of jute, cotton or other vegetable fibre, there is but one procedure. If water first applied does not put it out, all air openings are closed, and if the fire be not thereby smothered, scuttling of the vessel is the final alternative. This is the same on the Mississippi, the Hudson, or the Hoogly.*

* In case of the ship *Allan*, reported in 3 Taylor & Bell R., 27, also in Bengal and Calcutta Com. Cases, page 168, the statement of facts is as follows: "The *Allan*, outward bound, left Calcutta on the 8th of December last in charge of one Scallan, as pilot, assisted by his leadsman, and in tow of the *Dwarkanauth* steamer. About noon of the 11th, when within a short distance of the place at which, if all would have gone right, the steamer would have cast her off, and the pilot would have left her, the ship was discovered to be on fire. Every attempt which prudence or skill could suggest was made, but ineffectually, to extinguish the fire, and while this was going on, the ship was boarded first by two boats' crew from the steamer, and afterwards by the master and one boats' crew of the pilot brig, which was cruising near Reef Buoy. The crews of all three boats rendered assistance in the attempts made to keep down the fire, and more effectually in removing on board the steamer the private property of the master and seamen of the *Allan*. Ultimately after some consultation,

In the case at bar, it is unnecessary to discuss the propriety of the action of the Calcutta port officials. The finding as a fact by the Court below, without exception by appellants, is that their measures "were the best available to extinguish the fire and to save greater loss upon the cargo" (Fifth Finding, Transcript, p. 21).

In the ten years that have passed since the Wamsutta Mills' decision, the respect accorded to that high Court has not caused its views therein announced to be followed in other jurisdictions. It has practically been disregarded by the average adjusters of this country and Great Britain.† Whether all or part of the quenching of fire is by the port officials, the practice of adjusters and underwriters continues in all our cotton ports to treat all the consequences as general average—no doubt, in part by reason of the general adoption of the York-Antwerp Rules. How, indeed, could a separation ever be made between the results of the acts of the city officials and those of the ships' crews, where both exert themselves, successively, or together, as is generally the case, in putting out a cargo fire?

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it was determined to return into the river, *keeping the hatches closed and preventing, if possible, the fire from breaking out through the deck, and to endeavor to beach the ship in the most favorable spot to which she could be navigated.*" The report adds that this was done, the vessel scuttled, and left for the tide to go over her, to quench the fire—as in the case at bar, although the *Allan* was then near the mouth of the Hoogly River, and eighty miles from the jurisdiction of the Calcutta port officials.

† At the annual meeting of the British Association of Average Adjusters, the case of the Wamsutta Mills was commented upon by the president, as "much at variance with our law" (Proceedings of General Meeting, May 10, 1889, p. 26). The report there presented from the American correspondent (Mr. Gourlie) remarked of this decision:

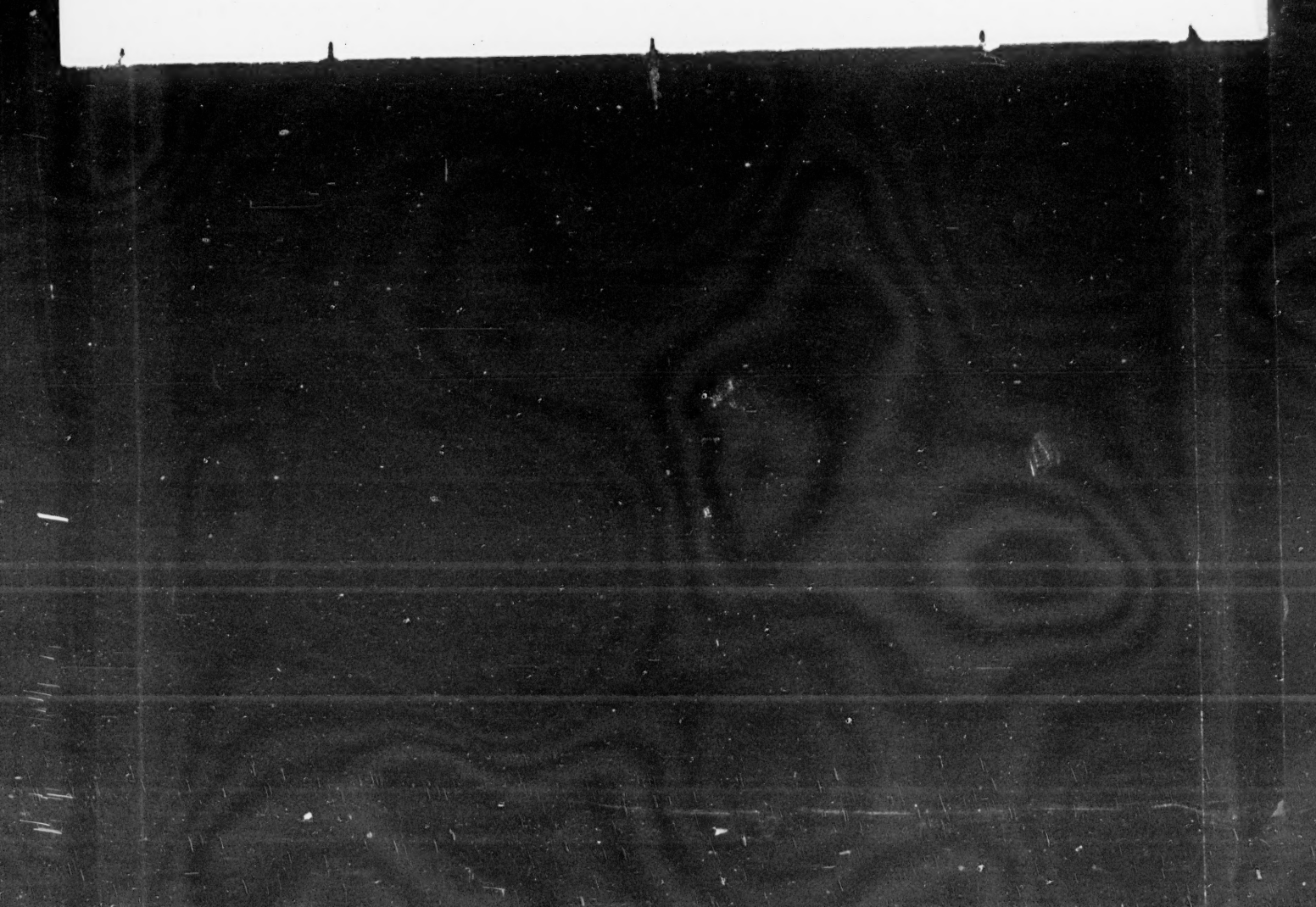
"Text writers and the Courts have undoubtedly defined an act of general average in general terms, as one voluntarily committed by the master, for the common good of the property under his charge, but such a definition was intended more to emphasize that the act must be that of one in authority, rather than the trivial or ill considered action of one of the crew, or, perchance, a passenger on the vessel, than as creating any limitation of the equitable rule of average contribution, which rests upon a broad rule of equity and public policy, and neither desires nor will long submit to any such limitation or qualification" (*Ibid.*, p. 29).

Often cited as the Wamsutta Mills case has been in the Federal Courts, it has never been followed.

To the authorities from the District and Circuit Courts, referred to in the brief on behalf of the appellees, should now be added the unanimous affirmance by the Circuit Court of Appeals for the Seventh Circuit of the *Roanoke* (reported in the Federal Reporter, Febry. 13, 1894, Vol. 59, p. 161). General average was there sustained in a case also of a jute cargo, which was extinguished by the action of the Buffalo Fire Department, while the vessel was alongside her dock, within the municipality, the port engines having been called in, as in the case at bar, by an alarm first given from the vessel.

HARRINGTON PUTNAM,
Counsel for Appellees.

April 26, 1894.



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United States Supreme Court,

OCTOBER TERM, 1893.

No. 299.

STEPHEN A. RALLI ET AL.,
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vs.

HOWARD D. TROOP ET AL.,
Appellees.

APPELLANTS' SUPPLEMENTAL BRIEF.

SIDNEY CHUBB,
of Counsel for Appellants.

Evening Post Job Printing House, New York.

United States Supreme Court,

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APPELLANTS' SUPPLEMENTAL BRIEF.

The appellants avail themselves of the permission given them by the order of this Court, made on April 23, 1894, to resubmit this case upon the transcript of record, original brief and this supplemental brief on their behalf.

They desire to add to their original brief the following points which were made by their counsel upon the oral argument herein on March 19th:

Point VI.

The appellees' contention that ill effects would result to the general commercial interests of the country from a reversal of the decree herein is entirely unfounded.

We understood the appellees' counsel to contend on the oral argument that our contention, if sustained by the Court, would deprive commerce of the benefit, in cases of fires on vessels in harbors, of all the resources of modern civilization by excluding the services of the costly and elaborate fire departments of our great cities.

Not only did we not claim that such services should not be availed of, but on the contrary, we expressly disclaimed the making of any such contention.

What we contend for is, not that the services of the fire departments should be refused or excluded, but that the effect of such services cannot be contributed for *in general average* unless such services were ordered or requested by the master as the result of his judgment that such services were for the best interests of the entire adventure committed to his charge.

The two District Court cases cited by the appellees are not, even if they were binding upon this Court, authorities against us.

In the first, *The Roanoke*, 53 *Fed. Rep.*, 270, s. c. 46 *Fed. Rep.*, 297, it was expressly found by the Court, that the acting master not only approved, but requested the services of the fire department, and in the other case, *The Rapid Transit*, 52 *Fed. Rep.*, 320, there is not a word in the opinion to show that as a matter of fact the master had not himself requested similar services, or that, as a matter of law, the consequences of a contrary state of fact, if it existed, was pleaded or otherwise called to the attention of the trial Court.

The appellees' counsel also cites on pages 8 and 9 of his brief from Stevens *v.* Benecke that—

> "Even the opposite case may be IMAGINED
> "where a necessary sacrifice made by the crew
> "in opposition to the master's will could not in
> "justice be excluded from it."

We submit that to defer to the "imagination" of a text book writer upon a point as to which there are reported cases, is to go far afield in search of law; moreover if in the case supposed, the sacrifice was concededly necessary, then the master who refused to order it must have been under the influence either of insanity or of some improper motive. If, on the other hand, there was properly room for a difference of opinion as to its advisability or necessity, then that any act of the crew against the master's orders would be unlawful and as such could not give rise to a claim for general average contribution.

The appellees' counsel also cites from a German commentator, Ulrich, to the effect that where by law or local custom the pilot takes command, the case is SUPPOSABLE that the pilot might order a sacrifice in conflict with the master, without thereby depriving the case of the character of a general average loss.

If such result follows in any case, which we deny, it would be because of the terms of a statute, but it is not necessary to consider supposable cases, and supposititious statutes, because by the statutes of the United States, Great Britain and most, if not all, maritime countries, as well as by the general maritime law, disobedience by the crew to an order of the master is a criminal offense, amounting in some cases to the capital crime of mutiny, and the pilot of a vessel is "in charge," never "in command" of her.

Point VII.

As our title to the jute and the master's sale of it at auction and the appellees' receipt of the net proceeds are all admitted on the pleadings, the defense is in reality a counterclaim of the amount of a contribution in general average due from the cargo owners to the vessel owners, which counterclaim is, therefore, to be alleged and proved by the appellees as an affirmative cause of action.

Under this Court's construction of the Act of 1875, the findings of fact should contain all the facts necessary to sustain the decree appealed from, as it is conceded "that where the ship's negligence has "made the sacrifice necessary she cannot recover a "general average contribution from the cargo" (Transcript, fol. 15). We submit that the absence from the findings of a finding that the sacrifice was not made necessary by the ship's negligence, is fatal to the appellees' case.

Point VIII.

As the purpose of the Act of 1875 has been declared by this Court to have been the relief of this Court from the burden of weighing conflicting evidence as to matters of fact, and as the appellees' counsel stated in his printed brief in the Circuit Court, "substantially there was little dispute below "on the facts. No new proofs are before this (Cir-"cuit) Court," the findings of fact herein are simply the Circuit Court's conclusions as to the legal effect and materiality of the evidence in the case, and are subject to review as such.

Part of the sixth finding was that "neither the "master nor the officers of the bark had any notice "of this regulation."

This was duly excepted to by our second exception upon the ground that the Circuit Court, against the objection and remonstrance of these appellants, thereby found a material fact, which is not supported by any evidence whatever.

Let us see what the appellees' counsel has to say concerning this finding. On page 2 of his brief, he says:

> "The second exception to the sixth finding
> "by the Court, merely raises the question of
> "law whether a port by-law is presumed to be
> "known to foreign vessels without any actual
> "notice, and is discussed under Point III."

Of course, if the finding is true, the appellants must then contend that notice is presumed, and need not, therefore, be proved, but our exception challenges the life of the finding and the appellees' reply is, in substance, "If we did not have notice in fact, we are going to argue that notice to us cannot be presumed."

As to the "foreign" vessel we again point out that this was a British vessel in a British port, loading with property of British subjects under a contract entered into in the British port of London.

Turning now to appellees' Point III, the only reference to the point that we can see is the following:

> "The practical disregard of this by-law by
> "the port authorities is clearly stated in the
> "opinion of the learned District Judge at page
> "10 of the Record."

This, we submit, is no answer at all. The District Judge was in error. There was no proof that "other foreign vessels at Calcutta had no knowledge of it." The appellees called several witnesses who had been in Calcutta or had inspected vessels coming from Calcutta, who testified that they had not seen lamps secured by lock and key on board such vessels. This was the full extent of the appellees' case upon the point; none of their expert

witnesses were asked whether they knew of the regulations in question, nor was the second officer, Pickles, asked this question, although he was a witness for his employers. It is also to be observed that the appellees' case fell far short of proving even that the regulation was a dead letter among vessels in Calcutta, for to prove this proposition it would be necessary to show not only that they had no protected lamps on board, but also that they habitually or frequently went into the holds of jute-laden ships with unprotected lamps, which proof was not even attempted by the appellees, and cannot be inferred, since *non constat* that there is any necessity to go into the hold of a jute loaded ship with artificial light. The necessity in this case arose out of the absence of proper chain lockers.

But our case upon this point is still stronger; not only is there an omission to question Pickles, who was a witness upon the point and to call the chief officer, Griffiths, who was in charge in the absence of the captain; but there is evidence from which actual notice can properly be inferred. The master, McManus, testified before the Marine Court (fol. 75): "I arrived in port about the 22d January last. The pilot gave me a tide table, but I do not know if he gave me a copy of the port rules or not."

The chief officer, Griffiths, testified before the same Court: "I saw no copy of the port rules, but I have been here before and have seen them, but have never studied them" (fol. 77). See also fol. 70).

Point IX.

The case of the *J. P. Donaldson*, 21 Fed. Rep., 67, is not against us.

It has been stated by one of the present Justices of this Court that the late Mr. Justice Matthews

changed his opinion as to that case after filing his decision. We submit that such change must have been, not because he thought the principles he adopted therein unsound, but because he afterwards came to the conclusion that the difference between the terms of the contract of transportation by towage then in hand and the customary contract of transportation by carriage, took the case out of the operation of those principles. There is manifestly a vast difference between the degrees of seaworthiness possessed by the powerful steam vessels used for towage on the great lakes and the barges—often hulks, frequently without sails or a sufficient crew—which they are engaged to tow. It is therefore certain that in an increasing storm a moment will come at which the barges become unseaworthy, while the tug is still seaworthy. Of this the cargo owner runs the risk, knowingly, and the tug's contract is, therefore, only to hang on to her tow as long as possible and then to save herself, and the analogy of the jettison of the cargo of a ship does not hold because in the latter case the whole adventure is at any given moment equally seaworthy or equally unseaworthy. The cargo owner selects his mode of transportation, and his contract with the tow is one of towage and not of carriage. The learned Circuit Justice in that case held the two contracts substantially similar. He must afterwards (and rightly) have come to the conclusion that the points of difference were material.

Point X.

The decree appealed from should be reversed, with costs.

Dated New York, April 24, 1894.

SIDNEY CHUBB,
of Counsel for Appellants.